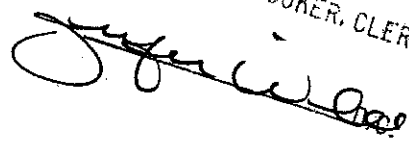


IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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STATE OF TENNESSEE, *ex rel.* ROBERT
E. COOPER, ATTORNEY GENERAL,

Plaintiff,

v.

CONSUMER DEPOT, LLC and MARTIN
FIKE, *et al.*,

Defendants.

No. 06C1093

MEMORANDUM
UPON PLAINTIFF, STATE OF TENNESSEE'S
MOTION FOR SUMMARY JUDGMENT

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BACKGROUND

This is a civil law enforcement proceeding filed by the State of Tennessee ("State") under the Tennessee Consumer Protection Act of 1977, alleging all defendants engaged in false advertising and various other unfair and deceptive business acts and practices in connection with their sale and advertising of goods to the public.

The background of this proceeding was briefly outlined in this Court's December 22, 2009 Order Granting Partial Summary Judgment to Plaintiff, State of Tennessee, on the Issue of the Inapplicability of Defendants' Affirmative Defenses (hereinafter "Dec. 22, 2008 Partial Summary Judgment Order"). *See* DKT. 198¹ and STATE'S EX. VOL. II, **824-62**.²

This proceeding was brought by the Attorney General of the State of Tennessee ("State") on May 2, 2006, alleging that Defendants Consumer Depot, LLC ("Consumer Depot") and its owner and operator Martin Fike engaged in numerous violations of the Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code Ann. § 47-18-101 *et seq.*, in connection with their sale and advertising of various electronics and related goods to the public through their Nashville retail store, on eBay, and through their own internet website. *See* Complaint, DKT. 1. An amended complaint was filed by the State with leave of court on November 30, 2006, which, among other things, added additional party defendants Auction Logistix, Carol Fike and Michael Hinds. *See* DKT. 82-83.

The present posture of these proceedings arises in the context of a case-dispositive summary

¹ "DKT." refers to the docket number from the Court's official record.

² "STATE'S EX. VOL." refers to one of two volumes of exhibits filed by the State in support of the present motion for summary judgment. All pages in these two volumes of exhibits are individually numbered in extra-large bold type, in the bottom right corner of each page. Citations to individual pages in these two volumes of exhibits will be denoted by volume number and page number, using bold numbers for the cited pages. VOL. I contains pages **1-540** and VOL. II contains pages **541-953**.

judgment motion filed by the State on February 10, 2009, as Amended on February 11, 2009. DKT. 199-204, 204-206. The State previously sought and obtained partial summary judgment on the issue of the inapplicability of the defendants' affirmative defenses, and that ruling is set forth in this Court's December 22, 2008 Partial Summary Judgment Order, DKT. 198. *See also* STATE'S EX. VOL. II, 824-62.

Trial in this matter was scheduled to begin April 19, 2009 and the present motion for summary judgment was filed by the State on February 10, 2009. *See* DKT. 196 and 199-05. Defendants sought and were granted a continuance of the trial, and were also granted an additional three months of time to respond to this motion. *See* DKT. 211 and 221. Argument on the present motion for summary judgment was also continued from April 30, 2009, and was eventually held on August 6 - 7, 2009. DKT. 211, 221. Following argument on Aug. 6 - 7, 2009, the Court requested the parties to submit proposed findings of fact and conclusions of law. Those submissions have been made by the parties and the Court is prepared to rule.

Approximately two-thirds of the proposed facts submitted by the State in support of its motion for summary judgment are not disputed by Defendants. While the State challenges the validity of Defendants' asserted grounds for disputing and objecting to Plaintiff's remaining proposed findings of facts, in order to grant Defendants every reasonable benefit of the doubt, the State has agreed to omit all allegedly disputed facts from the Court's consideration, and submit its motion to the Court based solely on the undisputed facts.

With the exception of those documents stricken and referenced in this Court's Order of December 21, 2009, the Court has considered the entire record, including the pleadings, discovery responses, affidavits, exhibits and arguments of counsel, submitted in connection with the State's motion for summary judgment. As more fully set forth below, because there are no genuine issues of

material fact in dispute and summary judgment is appropriate as a matter of law, the Court holds that summary judgment is hereby GRANTED to the State.

FINDINGS OF FACT³

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I. THE PARTIES

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A. State of Tennessee

1. The plaintiff is the State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General, and has the authority to enforce the Tennessee Consumer Protection Act of 1977, Tenn Code Ann. § 47-18-101, *et seq.*, through a civil law enforcement proceeding. *See* Dec. 22, 2008 Partial Summary Judgment Order, ¶ 1, DKT. 198 (SF 1)⁴ (**UNDISPUTED**).⁵

B. Consumer Depot

2. Defendant Consumer Depot, LLC ("Consumer Depot") is a Tennessee limited liability company with its principal place of business at 3332 Powell Avenue, Nashville, Tennessee. *Id.* at ¶ 2, DKT. 198 (SF 2) (**UNDISPUTED**).

3. Consumer Depot sells various electronic and computer goods to the general public from a retail facility located at 3332 Powell Avenue, through Consumer Depot's website and through third-party internet auction websites such as eBay. *Id.* (SF 3) (**UNDISPUTED**).

4. Consumer Depot obtains its inventory through bulk purchases of overstocked inventory, customer returns, open box returns, liquidated, damaged, defective and broken

³ Findings of Fact 1 - 10 and 13 - 29 were previously established by the Court in its December 22, 2008 Order Granting Partial Summary Judgment to Plaintiff, State of Tennessee as to the Issue of the Inapplicability of Defendants' Affirmative Defenses (hereinafter "Dec. 22, Partial Summary Judgment Order." *See* DKT 198 and STATE'S EX. VOL. II, 824-63.

⁴ The facts from the State's Memorandum of Facts shall be cited as "SF," for "State's Facts," followed by the paragraph number of the corresponding proposed fact.

⁵ Facts that are not disputed by defendants are identified as "**UNDISPUTED**." Partially disputed facts will be identified as such, and the disputed portion will be omitted from the fact.

items from retailers such as Staples and Best Buy. *Id.* at ¶ 8, DKT. 198 (SF 4) (UNDISPUTED).

5. Consumer Depot sorts these items, evaluates them and then offers them for sale to the public through its retail store or through the internet. *Id.* (SF 5) (UNDISPUTED).

6. Consumer Depot has operated under a number of different eBay user IDs and names including BARGAINDEPOT04, UBID-IT, YOUNBID2003, RETURNDEALZ, TECHGRAVEYARD, SURPLUSDEALZ05, SWDISCOUNTERS, FACTORYDEALZ, MR-APPLIANCE, MUSIC-N-DVDS and UBID-TN-01. *Id.* ¶ 9 (SF 6) (UNDISPUTED).

7. Consumer Depot has also referred to itself as Bargain Depot, Factory Dealz, Return Dealz and Surplus Dealz. *Id.* (SF 7) (UNDISPUTED).

C. Auction Logistix

8. Defendant Auction Logistix, LLC ("Auction Logistix") is a Tennessee limited liability company with a principal place of business at 3332 Powell Avenue, Nashville, Tennessee. *Id.* ¶ 6 (SF 8) (UNDISPUTED).

9. At all times relevant hereto, Auction Logistix has actively participated in all of the Defendants' sales and advertising, including the sale and advertising of Defendants' products and has facilitated consumers' payments for such products. *Id.* (SF 9) (UNDISPUTED).

10. Auction Logistix has also served as Defendants' agent and has processed all of Defendants' eBay or internet customer payments. *Id.* (SF 10) (UNDISPUTED).

11. Auction Logistix is owned and operated by defendant Martin Fike. *See* Resp. 20-21 to Plaintiff's Req. for Admission., STATE'S EX. VOL. II, 818 (SF 11) (UNDISPUTED).

12. Defendant Martin Fike controls or has the authority to control the acts and

practices of Auction Logistix. *Id.* (SF 12) (UNDISPUTED).

D. Martin Fike

13. Defendant Martin Randolph Fike ("Fike") is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot. *See* Dec. 22, 2009 Order Granting Partial Summary Judgment, ¶ 3, DKT. 198 *and* STATE'S EX. VOL. II, 824-62 (SF 13) (UNDISPUTED).

14. Defendant Fike created Consumer Depot on March 30, 1995. *Id.* at ¶ 7 (SF 14) (UNDISPUTED).

15. At all times relevant hereto, defendant Fike has controlled and managed Consumer Depot in its day-to-day activities. *Id.* at ¶ 3 (SF 15) (UNDISPUTED).

16. At all times relevant hereto, defendant Fike has been actively involved in Consumer Depot's day-to-day activities. *Id.* at ¶ 7 (SF 16) (UNDISPUTED).

17. Defendant Fike has served as the managing member of Consumer Depot since its inception. *Id.* (SF 17) (UNDISPUTED).

18. Defendant Fike created Auction Logistix on June 2, 2004. *Id.* (SF 18) (UNDISPUTED).

19. At all times relevant hereto, defendant Fike has controlled and managed Auction Logistix in its day-to-day activities. *Id.* (SF 19) (UNDISPUTED).

20. Defendant Fike has served as the managing member of Auction Logistix since its inception. *Id.* (SF 20) (UNDISPUTED).

21. At all times relevant hereto, defendant Fike has been actively involved in Auction Logistix' day-to-day activities. *Id.* (SF 21) (UNDISPUTED).

E. Carol Fike

22. Defendant Carol Fike ("Carol Fike") is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot. *Id.* at ¶ 4 (SF 22) (UNDISPUTED).

23. Defendant Carol Fike also helps control and manage Consumer Depot in its day-to-day activities. *Id.* (SF 23) (UNDISPUTED).

24. Carol Fike has also participated in formulating policy for Consumer Depot and supervises certain Consumer Depot employees and departments. *Id.* (SF 24) (UNDISPUTED).

25. In addition to her husband Martin Fike, Carol Fike is the only other owner of Consumer Depot. *Id.* (SF 25) (UNDISPUTED).

F. Michael Hinds

26. Defendant Michael Hinds ("Hinds") is a Tennessee resident and an employee and agent of Consumer Depot. *Id.* at ¶ 5 (SF 26) (UNDISPUTED).

27. At all times relevant hereto, defendant Hinds ("Hinds") has personally and actively participated in many of Consumer Depot's day-to-day activities. *Id.* (SF 27) (UNDISPUTED).

28. Defendant Hinds has some authority as an agent or employee to act on behalf of Consumer Depot and has also participated in formulating policy for Consumer Depot. *Id.* (SF 28) (UNDISPUTED).⁶

29. Defendant Hinds also supervises certain Consumer Depot employees and

⁶ From this point forward, the Court's numbering departs from the numbering in the State's Mem. of Facts, because defendants begin to dispute some facts after Fact 28. SF 29, for example, has been omitted at the State's request, because it is allegedly disputed by defendants.

departments. *Id.* (SF 30) (UNDISPUTED).

II DEFENDANTS' UNFAIR AND DECEPTIVE BUSINESS PRACTICES

A. The Multitude of Complaints Against Consumer Depot

30. The Tennessee Division of Consumer Affairs ("DCA") is a government agency charged with receiving complaints from the public regarding unfair or deceptive business practices. *See* Hughey (DCA) Aff. ¶¶ 1-3, STATE'S EXS. VOL. I, 34-35 (SF 31). (UNDISPUTED).⁷

31. Numerous consumers have complained that Consumer Depot advertises that "New" merchandise is being sold, but then sends used, broken or defective merchandise instead. *See, e.g.,* Citro Aff., 49, Koehler Aff., 55, Layton Aff., 59-60, Martin Aff., 85-87, McDermott Aff., 88-92, Moultrie Aff., 98-100, Schuler Aff., 127-29, Scripture Aff., 135-36, and Wilkes Aff., 168-69, STATE'S EXS. VOLS. I and II (SF 32) (UNDISPUTED IN PART).⁸

32. Consumers complain that Consumer Depot uses terms like "Brand New," "SEALED," or "New/Open Box," for example, and often posts photographs which display merchandise in new, unopened packages. *See, e.g.,* McDermott Aff., 88-89, Moultrie Aff., 101, Schuler Aff., 127-28 and Wilkes Aff., 168-69, STATE'S EXS. VOL. I (SF 185)

⁷ *See also* Tenn. Code Ann. § 47-18-5002(5) ("The [DCA] . . . shall . . . (5) Serve as the central coordinating agency and clearinghouse for receiving complaints by Tennessee consumers of illegal, fraudulent, deceptive or dangerous practices . . .")

⁸ Defendants admit Finding 31 (SF 184) in part and state "Any complaints from the Baldwin and Hughey Affidavits are disputed as inadmissible hearsay; otherwise UNDISPUTED for purposes of this Motion." *See* DEF. RESP. TO STATE'S FACT 184. While the State disagrees that Ms. Baldwin and Ms. Hughey's first hand accounts of their work in the Attorney General's Office and the Tennessee Division of Consumer Affairs constitute hearsay, in order to grant defendants every possible benefit of the doubt in the Court's consideration of the pending motion for summary judgment, reference to these affidavits have been omitted from this paragraph.

(UNDISPUTED).

33. Many consumers . . . have complained that after winning a Consumer Depot eBay auction and paying for their item, Consumer Depot sent entirely different items. *See, e.g.,* Baldwin (Attorney General) Aff., ¶ 6, 27-29, Hubbell (BBB) Aff., ¶ 14, 194, Hughey Aff., ¶ 5, 35, Koehler Aff. ¶¶ 1-2 and Ex. A thereto, 51-58, Layton Aff., ¶ 6, 59-60, and Muto Aff., ¶ 6, 111, STATE'S EXS. VOL. I (SF 150) (UNDISPUTED).

34. Consumers have also complained that Consumer Depot sells visibly defective merchandise as new or functional. *See, e.g.,* Hubbell (BBB) Aff., ¶ 14, 194, Martin Aff., 85-87, McDermott Aff., 88-89, Schuler Aff., 128, Streiff Aff., 622-27, Weissman Aff., 162, and BBB Complaint Records, 215, 269, 284, 288, 295, 333, and 335, STATE'S EXS. VOLS. I and II (SF 264) (UNDISPUTED).

35. Consumer Depot routinely advertises that merchandise is in good cosmetic shape or otherwise "looks good." *See, e.g.,* STATE'S EXS. VOL. I, 125 and 312 (SF 359) (UNDISPUTED).

36. Consumers have . . . reported receiving allegedly new or functional merchandise from Consumer Depot which was prominently labeled with a "DEFECTIVE" or "RETURN" sticker. *See* Martin Aff., 85-87, and Streiff Aff., ¶ 6, 623, STATE'S EXS. VOLS. I and II (SF 265) (UNDISPUTED).

37. Consumers who have made these complaints were led to believe that the items being offered for sale by Consumer Depot were functional and suitable for purchase. *See, e.g.,* Lock Aff., ¶¶ 1-7, 69-84, Machata Aff., ¶¶ 2-12, 118-23, Myers Aff., ¶¶ 1-9, 118-23, and Streiff Aff. ¶ 4, 623, STATE'S EXS. VOLS. I and II (STATE'S FACT 222) (UNDISPUTED IN

PART).⁹

38. Consumers [also] frequently complain that their attempts to remedy problem transactions with Consumer Depot prove futile. *See, e.g.,* Muto Aff., **157-72** and **509-511**, and Layton Aff., **172-83** and **604-05**, STATE'S EX. VOLS. I and II (SF 490) (UNDISPUTED IN PART).¹⁰

B. Examples of Defendants' Deceptive Conduct¹¹

(1) Consumer Amity Armes

39. On March 4, 2006, consumer Amity Armes visited Consumer Depot's eBay auction site under its "**bargaindepot04**" eBay ID. *See* Armes Aff., ¶ 1, STATE'S EXS. VOL. II, **541** (SF 192) (UNDISPUTED).

40. At that time, Ms. Armes saw that Consumer Depot was selling a **New Apple Brand iPod Shuffle Armband** as item number 8774217861. *Id.* (SF 193) (UNDISPUTED).

41. An excerpt from the item description of Consumer Depot's eBay auction for

⁹ Defendants admit Fact 37 (SF 222) in part and state "UNDISPUTED for purposes of this Motion as to what the consumers believe, but it is DISPUTED that said beliefs were reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO STATE'S FACTS, ¶ 222. Whether or not such consumers' beliefs were reasonable or arose out of the conduct of Consumer Depot is not relevant to the present inquiry. It also constitutes a legal conclusion. Moreover, there is no reference to this issue in Fact 222.

¹⁰ Defendants admit Fact 38 (SF 490) in part and state "The statements above from the Affidavits of consumers Muto, (**157-172**, **509-511**, and **604** herein) and Layton (**172-183**, **604-605**) are treated with their affidavit testimony. The remainder of the above is DISPUTED in that the remainder of the above citations are to the inadmissible hearsay contained in the affidavits of Donna Baldwin, Joyce Hughey and Bert Hubbell." DEF. RESP. TO STATE FACTS, ¶ 490 (emphasis in original). To afford defendants every reasonable benefit of the doubt, while the State's disagrees with defendants' hearsay assertion, reference to the affidavits from the Attorney General's Office, the BBB and the DCA have been omitted from this Fact.

¹¹ For ease of reference, all consumer accounts have been arranged in alphabetical order, by the consumer's last name.

the **New Apple Brand iPod Shuffle Armband** viewed by Ms. Armes is set forth below in

Figure 1:¹²

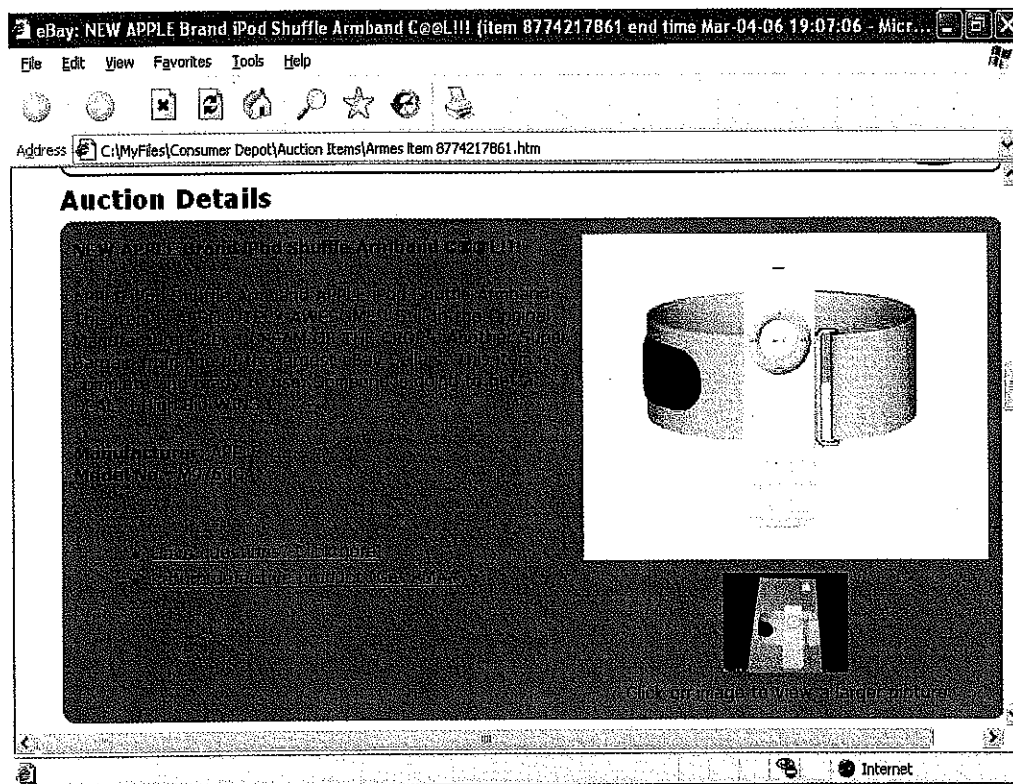


Figure 1

Id. at ¶¶ 1-2 and Ex. A thereto, STATE'S EXS. VOL. II, 541-51 (SF 194) (UNDISPUTED).¹³

42. Consumer Depot's auction pages included at least four photographs of the **New Apple Brand iPod Shuffle Armband**. *Id.* at ¶ 3 and Ex. A thereto (SF 195) (UNDISPUTED).

43. Consumer Depot's advertising led Ms. Armes to believe it was offering a

¹² Formerly **Figure 11** in State's Mem. of Facts.

¹³ Ms. Armes also includes and authenticates a complete copy of her Consumer Depot auction page for this transaction, which defendants do not dispute. *See* Ex. A to Armes Aff., STATE'S EXS. VOL. II, 541-51.

brand new product and did not mention nor otherwise disclose any problems or defects with the armband. *Id.* at ¶ 3, State's Ex. Vol. I, 542 (SF 196) (UNDISPUTED IN PART).¹⁴

44. When Ms. Armes received her shipment from Consumer Depot, she observed the following:

When my Apple iPod Armband arrived from consumer Depot, it was not as advertised. It had blood and sweat stains on it and was obviously used, not new as advertised by Consumer Depot. The item was quite disgusting.

Id. at ¶ 5 (emphasis in the original), STATE'S EX. VOL. II, 542 (SF 197) (UNDISPUTED).

45. Ms. Armes left negative feedback on eBay against Consumer Depot and Consumer Depot promptly left negative feedback against her. *Id.* at ¶ 7 (SF 199) (UNDISPUTED IN PART).¹⁵

46. Ms. Armes felt she had been defrauded, deceived and misled by Consumer Depot. *Id.* at ¶ 8 (SF 200) (UNDISPUTED IN PART).¹⁶

¹⁴ Defendants admit Fact 43 (SF 196) in part and state "It is UNDISPUTED for purposes of this Motion as to what Ms. Armes may have concluded, but it is DISPUTED that such was reasonable construction of the auction language. See Exhibit Z to Martin Fike Affidavit." See DEF. RESP. TO STATE'S FACT 196. Whether or not Ms. Armes' construction of defendants' auction language was "reasonable" is not a factual issue. Moreover, such an issue is not relevant to any issue in this case. The Court further notes that Exhibit Z, which defendants cite to generally in support of their above comment, consists of over five hundred pages.

¹⁵ Defendants admit Fact 45 (SF 199) in part and state "UNDISPUTED for purposes of this Motion, that each party left negative feedback for the other, but DISPUTE that by doing so Consumer Depot 'retaliated.'" See DEF. RESP. TO SF 199. The reference to retaliation has been omitted from this statement.

¹⁶ Defendants admit Fact 46 (SF 200) in part and state "Ms. Armes' feelings are UNDISPUTED for purposes of this Motion, but Defendants DISPUTE that said belief was reasonable or arose out of the conduct of Consumer Depot." See DEF. RESP. TO STATE'S FACT 200. Whether or not Ms. Armes' feelings were "reasonable" or arose out of the conduct of Consumer Depot is not a factual issue. Moreover, such an inquiry is not relevant to the issues presently before the Court.

(2) Consumer William Bartling

47. In March of 2006, consumer William Bartling decided he was interested in purchasing a quality all-in-one copier/fax/printer for his home network. *See* Bartling Aff., ¶ 2, STATE'S EX. VOL. II, 552-59 (SF 107) (UNDISPUTED).

48. On March 26, 2006, Mr. Bartling visited one of Consumer Depot's eBay auctions, which Consumer Depot was conducting under the user id "**bargaindepot04.**" *Id.* at ¶ 1, STATE'S EX. VOL. II, 552-59 (SF 108) (UNDISPUTED).

49. At that time, Mr. Bartling saw that Consumer Depot had placed a **Panasonic KX-FL511 Laser Copy/Fax/Printer All In One** NR product on eBay for auction, as item number 6863498401. *Id.*, and *see* Ex. A thereto, STATE'S EX. VOL. II, 552-59 (SF 109) (UNDISPUTED).

50. In particular, Consumer Depot also displayed three photographs of the **Panasonic Copy/Fax/Printer** in its eBay auction page, as depicted in **Figure 2**,¹⁷ left, which is a copy of the entire eBay auction page for Mr. Bartling's **Panasonic Copy/Fax/Printer**. *See* **Figure 2**, left, and Ex. A to Bartling Aff., STATE'S EX. VOL. II, 552-59 (SF 110) (UNDISPUTED).¹⁸

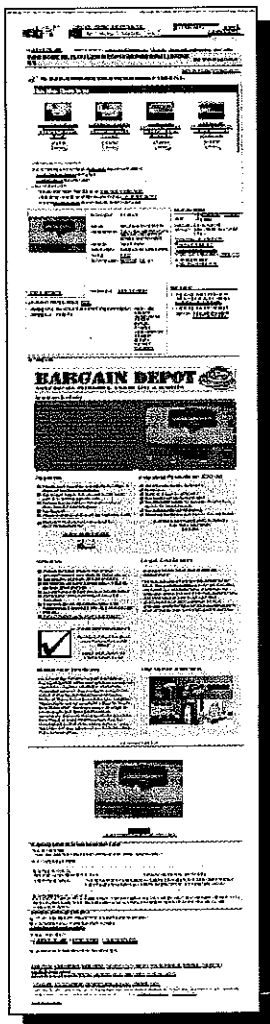


Figure 2

¹⁷ Formerly **Figure 1** in State's Mem. of Facts.

¹⁸ Mr. Bartling also authenticated a complete copy of his Consumer Depot auction page for this transaction, which defendants do not dispute. *See* Ex. A to Bartling Aff., STATE'S EX. VOL. II, 552-559.

51. In addition, Consumer Depot advertised a written description of the **Panasonic Copy/Fax/Printer**, which directed [the] consumer to look at the included photographs and specifically provided as set forth in **Figure 3**,¹⁹ below, right. *Id.*, STATE'S EX. VOL. II, 552-59 (SF 111) (UNDISPUTED).

52. Mr. Bartling decided to bid on the **Panasonic Copy/Fax/Printer**, and on March 26, 2006, submitted the winning bid for this item. *See* Bartling Aff., ¶ 3, STATE'S EX. VOL. II, 552-59 (SF 112) (UNDISPUTED).

53. Mr. Bartling won the **Panasonic Copy/Fax/Printer**

**PANASONIC KX-FL511 LASER
COPY / FAX / PRINTER ALL IN ONE NR**

They say a picture is worth a thousand words? We don't have time to type that much. Look at this picture!! Another great auction item. Don't let this one get away. What you see in the photo is what is included. Not Happy? Send it back within 7 days for your money back! (Except on SOLD AS IS Items i.e., Software, Media, Ink & Toner. Please see the RETURNS Section on this auction for more info.)

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Figure 3

for a total bid of \$.99, but had to pay \$32.00 in shipping costs to Consumer Depot. *Id.* (SF 113) (UNDISPUTED).

54. Mr. Bartling paid Consumer Depot for his **Panasonic Copy/Fax/Printer** within one hour of winning the auction. *Id.* at ¶ 7 (SF 114) (UNDISPUTED).

55. When Mr. Bartling's purchase above purchased arrived from Consumer Depot, it was not as advertised because it was not a **Panasonic Copy/Fax/Printer**, but, rather, was a copy/fax machine only with no printing capability and could not be plugged into a computer;

¹⁹ Formerly **Figure 2** in State's Mem. of Facts.

it also appeared to have a damaged drum. *Id.* ¶ 4 (SF 115) (**UNDISPUTED**).

56. Mr. Bartling . . . requested an RMA number (“Return Merchandise Authorization”) from Consumer Depot, but when he did, he was told that all shipping charges back to Consumer Depot would be his responsibility, even though Consumer Depot sent him the wrong product. *Id.* at ¶ 5 (SF 117) (**UNDISPUTED**).

57. Consumer Depot . . . stated that all returns had to be 100% complete, in original and resalable condition, with all original boxes and packing materials, manuals, registration card(s), software, blank warranty cards, cabling and other accessories and documentation if included, and that it reserved the right to refuse the return of any product that did not meet these requirements. *Id.* at ¶ 6 (SF 118) (**UNDISPUTED**).

58. Mr. Bartling felt he had no choice but to leave accurate and negative feedback about Consumer Depot on eBay indicating that the product was misrepresented and that the seller was unresponsive. *Id.* at ¶ 7 (SF 122) (**ADMITTED UNDISPUTED IN PART**).²⁰

59. As soon as Mr. Bartling left negative feedback against Consumer Depot, Consumer Depot promptly left negative feedback on eBay against him, even though he had paid Consumer Depot in full within an hour of the auction closing. *Id.* (SF 123) (**UNDISPUTED**).

60. After receiving the negative feedback from Consumer Depot, Mr. Bartling sent Consumer Depot an additional six emails trying to communicate with Consumer Depot, but

²⁰ Defendants admit Fact 58 (SF 122) in part and state: “UNDISPUTED for purposes of this Motion as to Mr. Bartling’s feelings, but it is DISPUTED that his feelings were reasonable or arose out of the conduct of Consumer Depot.” *See* DEF. RESP. TO SF 122. Whether or not Mr. Bartling’s feelings were reasonable or arose out of the conduct of Consumer Depot is not a factual issue. Moreover, such an inquiry is not relevant to the issues presently before the Court.

Id. at 2, and see Ex. A to Citro Aff., STATE'S EX. VOL. I, **48-50** (emphasis added) (SF 236) (UNDISPUTED).

65. On June 13, 2004, Mr. Citro submitted the winning bid for Consumer Depot's **SONY PEG-SJ20 Clie Handheld PDA** in the amount of \$36.00 for the calculator and an additional \$12.00 in shipping charges. *Id.* (SF 240) (UNDISPUTED).

66. [T]he power supply and wires which arrived with the **SONY PDA** were not compatible with the unit and could not be used. *Id.* at ¶ 6. (SF 242) (UNDISPUTED).

67. On June 21, 2004, Mr. Citro spent an additional \$17.85 to return the nonfunctional **SONY PDA** to Consumer Depot. *Id.* at ¶ 7. (SF 244) (UNDISPUTED).

68. Consumer Depot eventually refunded Mr. Citro the original \$36.00 he paid for the **SONY PDA**, but refused to refund the original shipping charge of \$12.00 or the \$17.85 Mr. Citro spent to send the **SONY PDA** back to Consumer Depot. *Id.* at ¶ 8. (SF 245) (UNDISPUTED).

69. Mr. Citro felt he paid for a product but got used junk in return. *Id.* at ¶ 9. (SF 246) (UNDISPUTED IN PART).²³

(4) Consumer Justin Kennedy

70. On August 29, 2005, consumer Justin Kennedy visited the eBay's internet site and saw that Consumer Depot, through its "**bargaindepot04**" eBay user id, was selling a

²³ Defendants admit Fact 69 (SF 246) in part and state "Mr. Citro's feelings are UNDISPUTED for purposes of this Motion, but it is DISPUTED that said belief was reasonable or arose out of the conduct of Consumer Depot. See DEF. RESP. TO STATE'S FACTS, ¶ 246. Whether or not Mr. Citro's feelings were 'reasonable' is not relevant to the present inquiry and constitutes a legal conclusion. Moreover, there is no reference to the reasonableness of Mr. Citro's feelings in this fact.

only received automated form letters in return, none of which addressed, resolved nor offered to resolve his complaints. *Id.* (SF 124) (UNDISPUTED).

61. Mr. Bartling felt he had been deceived, misled and defrauded by Consumer Depot. *Id.* (SF 125) (UNDISPUTED).²¹

(3) Consumer Mark Citro

62. In mid-June of 2004, consumer Mark Citro visited the eBay internet site looking for a PDA (personal digital assistant). *See* Citro Aff., ¶ 1, STATE'S EX. VOL. I, 45-50. (SF 234) (UNDISPUTED).

63. At that time, Mr. Citro observed that Consumer Depot, through its "bargaindepot04" user id, was selling a **SONY PEG-SJ20 Clie Handheld PDA** (hereinafter the "SONY PDA") as item number 5704211958. *Id.* ¶ 1 and *see* Ex. A thereto (SF 235) (UNDISPUTED).²²

64. Consumer Depot's eBay auction description for the **SONY PDA** stated the following:

If you are looking for a deal - LOOK NO FURTHER! This item is a store display model from a major retail store. It has been inspected by our technicians to insure that it is FUNCTIONAL. It may have signs of usage. (May be missing software/manual or accessories - check manufacturers website for available drivers or software downloads) SONY PEG-SJ20 Monochrome 16MB PDA 3rd Party Stylus/Pen NO PLUG ADAPTER

²¹ Defendants admit Fact 61 (SF 125) in part and state: "UNDISPUTED for purposes of this motion as to Mr. Bartling's feelings, but it is DISPUTED that his feelings were reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO SF 125. No reference to the "reasonableness" of Mr. Bartling's feelings is included in the statement.

²² Mr. Citro also authenticated a complete copy of his Consumer Depot eBay auction page for this transaction, which defendants do not dispute. *See* Ex. A to Citro Aff., STATE'S EX. VOL. I, 45-50.

Nintendo Gamecube Video Game Platinum System *NIB* through auction as item number 8214939181. *See* Kennedy Aff., ¶ 1, STATE'S EX. VOL. II, 591-92 (SF 283) (UNDISPUTED).

71. Consumer Depot's eBay auction description for the **Nintendo Gamecube** stated that it was "new in box" ("*NIB*"), which led Mr. Kennedy to believe he would receive a new Nintendo Gamecube that would be in good shape and fully functional. *Id.* at ¶ 2 (SF 284) (UNDISPUTED).²⁴

72. On August 29, 2005, Mr. Kennedy submitted the winning bid for the **Nintendo Gamecube** for a total of \$78.00: \$56.00 for the winning bid and \$22.00 for shipping. *Id.* at ¶ 3 (SF 285) (UNDISPUTED).

73. When Mr. Kennedy's Nintendo Gamecube arrived from Consumer Depot, it was visibly broken: a joystick was broken and the game was scratched. *Id.* ¶ 4 (SF 286) (UNDISPUTED).

74. It was obvious to the naked eye that the joystick was broken and the game was badly scratched. *Id.* (SF 287) (UNDISPUTED).

75. Mr. Kennedy eventually received a response from Consumer Depot which claimed it had not received any of its earlier emails. *Id.* at ¶ 5 (SF 289) (UNDISPUTED).

76. Mr. Kennedy filed disputes with eBay and with the Division of Consumer Affairs. *Id.* at ¶ 6 (SF 291) (UNDISPUTED IN PART).²⁵

²⁴ Defendants admit Fact 71 (SF 284) in part and state "It is UNDISPUTED for purposes of this Motion that the auction language is included in the language referenced above but it is DISPUTED that it was the sum total of the auction language." *See* DEF. RESP. TO STATE'S FACTS, ¶ 284. SF 284 does not purport to be the only language of the auction, and no such interpretation is being urged by the State.

²⁵ Defendants admit Fact 76 (SF 291) in part and state "it is UNDISPUTED for purposes of this motion that Mr. Kennedy filed disputes, but it is DISPUTED that Consumer Depot

77. Mr. Kennedy eventually left negative feedback against Consumer Depot on eBay and Consumer Depot promptly . . . left negative feedback against Mr. Kennedy on eBay. *Id.* (SF 292) (UNDISPUTED IN PART).²⁶

78. Mr. Kennedy would have never spent \$78.00 for a Nintendo Gamecube that was broken and scratched. *Id.* ¶ 7 (SF 293) (UNDISPUTED).

(5) Consumer Gerald Koehler

79. On November 3, 2005, consumer Gerald Koehler visited Consumer Depot's "returndealz04" eBay auction site. *See* Koehler Aff., ¶ 1, State's Ex. Vol. I, 51-58 (SF 151) (UNDISPUTED).

80. At that time, Mr. Koehler saw that Consumer Depot was selling **Quicken Premier 2006 Personal Finance Software** for auction as item 8230320942. *Id.* (SF 152) (UNDISPUTED).

81. On November 3, 2005, Mr. Koehler submitted the winning bid for the above **Quicken Premier 2006 Personal Finance Software**. *Id.* at ¶ 5, 52 (SF 154) (UNDISPUTED).

82. When Mr. Koehler received his shipment from Consumer Depot, his package did not contain Quicken software at all, but, instead, contained *a broken cordless phone*. *Id.* at ¶ 6. (SF 155) (emphasis in original) (UNDISPUTED).

83. **Figure 4**, below, is an excerpt from the item description portion of Consumer

refused to refund his money." *See* DEF. RESP. TO STATE'S FACTS, ¶ 291. Reference to Consumer Depot's refusal to refund Mr. Kennedy's money has been omitted from Fact 76 (SF 291).

²⁶ Defendants admit Fact 77 (SF 292) in part and state "UNDISPUTED for purposes of this Motion that both parties left negative feedback, but it is DISPUTED that by doing so Consumer Depot 'retaliated.'" *See* DEF. RESP. TO SF 292. The reference to retaliation has therefore been omitted from this Finding of Fact.

Depot's eBay auction for the **Quicken Premier 2006** software purchased by Mr. Koehler.

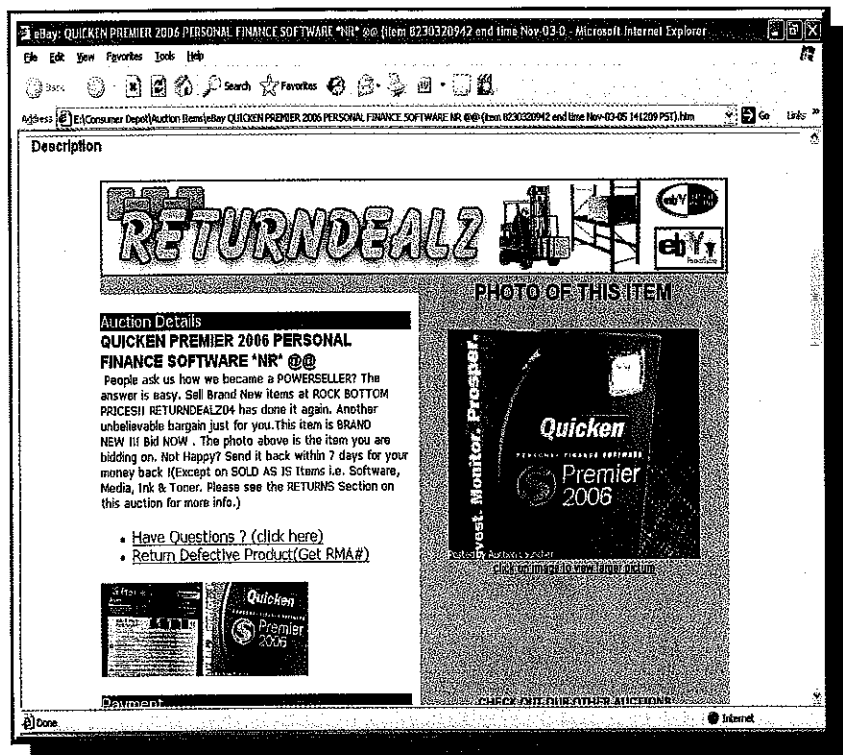


Figure 4

Id. at ¶¶ 1-2 and Exhibit A thereto (SF 153) (**UNDISPUTED**).²⁷

84. Mr. Koehler made numerous attempts at contacting Consumer Depot by phone and through its webform, but was not able to get any meaningful response. *Id.* at ¶ 7 (SF 156) (**UNDISPUTED**).

85. Eventually, Mr. Koehler posted negative feedback against Consumer Depot on eBay and even though Consumer Depot had sent Mr. Koehler the wrong item, Consumer Depot promptly posted negative feedback against him on eBay. *Id.* at ¶ 8 (SF 157) (**UNDISPUTED**).

²⁷ Formerly Figure 6 in State's Mem. of Facts.

86. To date, Consumer Depot has not refunded Mr. Koehler's payment nor otherwise responded to Mr. Koehler's requests for help and Mr. Koehler felt that Consumer Depot misled and deceived him. *Id.* at ¶ 9 (SF 158) (UNDISPUTED).

(6) Consumer Mitch Krinsky

87. On January 14, 2006, consumer Mitch Krinsky visited the eBay internet site and saw that Consumer Depot, through its "bargaindepot04" eBay user id, was selling an **ATT Two-Line Corded Home Phone 972 Speakerphone** through auction, as item number 5853281769. *See* Krinsky Aff., ¶ 1 and Ex. A thereto, STATE'S EX. VOL. II, at **593-02** (SF 383 and 405) (UNDISPUTED).

88. Consumer Depot's eBay auction description for ATT Speakerphone stated the following:

Auction Details

ATT TWO-LINE CORDED HOME PHONE 972

SPEAKERPHONE *LOOK*

- This item works great and is in it's [sic] original box. The photo above is the item you are bidding on.

● Have questions? Click here!

● Return defective product (Get RMA#)

Id. at ¶ 2 and Ex. A at 2, (SF 384 and 406) (UNDISPUTED IN PART).²⁸

89. Consumer Depot's advertisement for the **ATT Speakerphone** specifically stated that it "**works great,**" was still in its "**original box**" and that the item in the

²⁸ Defendants admit Fact 88 (SF 384 and 406) in part and state: "It is UNDISPUTED that the auction language contained the verbage [sic] above, but it is DISPUTED that that was the sum total of such auction language." *See* DEF. RESP. TO SF 384 and 406. There is no assertion by the State that this advertising statement constitutes the sum total of the auction language viewed by Mr. Krinsky, and the State's supporting exhibits includes a complete copy of Mr. Krinsky's eBay auction. *See* STATE'S EX. VOL. II, **593-02**.

photograph was the same item that Mr. Krinsky was bidding on. *Id.* at ¶ 2 and see Ex. A at p. 2, 594 and 598 (SF 385 and 407) (UNDISPUTED IN PART).²⁹

90. Consumer Depot's above description and photographs led Mr. Krinsky to believe that he would receive the **ATT Speakerphone** exactly as depicted and described. *Id.* ¶ 4 (SF 387 and 409) (UNDISPUTED).

91. On January 14, 2006, Mr. Krinsky submitted the winning bid for Consumer Depot's above **ATT Speakerphone** and paid Consumer Depot a total of \$ 14.99: \$.99 for the winning bid and \$ 14.00 for shipping. *Id.* ¶ 5 (SF 388 and 410) (UNDISPUTED).

92. When Mr. Krinsky's **ATT Speakerphone** arrived from Consumer Depot it was not as described and was missing its handset. *Id.* ¶ 6. (SF 389 and 411) (UNDISPUTED).

93. Mr. Krinsky immediately tried contacting Consumer Depot by e-mail, but could not get a response. *Id.* ¶ 7 (SF 390 and 412) (UNDISPUTED).

94. Mr. Krinsky also tried calling Consumer Depot by telephone and eventually went back to the auction page and clicked on the return link. *Id.* (SF 391 and 413) (UNDISPUTED).

95. Mr. Krinsky was not willing to spend \$20.00 to get a \$.99 refund, so he did not pursue a return with Consumer Depot. *Id.* ¶ 8 (SF 393 and 415) (UNDISPUTED).

²⁹ As with the immediately preceding fact, defendants admit Fact 89 (SF 385 and 407) in part and state "It is UNDISPUTED that the auction language contained the verbage [sic] above, but it is DISPUTED that that was the sum total of such auction language." See DEF. RESP. TO SF 385 and 407. There is no assertion by the State that this advertising statement constitutes the sum total of the auction language viewed by Mr. Krinsky, and the State's supporting exhibits includes a complete copy of Mr. Krinsky's complete eBay auction. See STATE'S EX. VOL. II, 593-02.

96. Mr. Krinsky left negative feedback about Consumer Depot on eBay and Consumer Depot promptly left negative feedback against Mr. Krinsky. *Id.* ¶ 8 (SF 394 and 416) (**UNDISPUTED IN PART**).³⁰

97. Mr. Krinsky would never have purchased the **ATT Speakerphone** if he had known it would arrive without a handset. *Id.* ¶ 9 (SF 395 and 417) (**UNDISPUTED IN PART**).³¹

(7) **Consumer Veronica LaRock**

98. On or about March 14, 2005, Consumer Veronica LaRock visited the eBay's internet auction site to buy a **Sims2 Game** for her daughter. *See* LaRock Aff., ¶ 1, STATE'S EX. VOL. II, 603-04 (SF 448) (**UNDISPUTED**).

99. At that time, Mrs. LaRock saw that Consumer Depot, through its eBay user id "**swdiscounters**" was offering a **Sims2 Game** for auction. *Id.* (SF 449) (**UNDISPUTED**).

100. Consumer Depot's eBay auction description for the **Sims2 Game** stated that Consumer Depot had checked to make sure all the disks were included in the package. *Id.* at ¶ 2 (SF 450) (**UNDISPUTED IN PART**).³²

³⁰ Defendants admit Fact 96 (SF 394 and 416) in part and state: "It is **UNDISPUTED** for purposes of this Motion that both parties left negative feedback, but it is **DISPUTED** that Consumer Depot "retaliated." *See* DEF. RESP. TO SF 394 and 416. Mr. Krinsky's reference to "retaliation" by Consumer Depot has therefore been omitted from this fact.

³¹ Defendants admit Fact 97 (SF 395 and 417) and state: "It is **UNDISPUTED** for purposes of this Motion as to what Mr. Krinsky felt, but it is **DISPUTED** that Consumer Depot's return procedures would be "so difficult and costly." *See* DEF. RESP. TO SF 395 and 417. Mr. Krinsky's reference to Consumer Depot's "difficult and costly" return procedures has therefore been omitted from this fact.

³² Defendants admit Fact 100 (SF 450) in part and state "It is **UNDISPUTED** that the auction language contained the above verbiage but it is **DISPUTED** that the verbiage was the sum total of the auction language." *See* DEF. RESP. TO SF 450. There is no assertion by the State that this advertising statement constitutes the sum total of the auction language viewed by Ms. LaRock, and the State has never made such an allegation in this case.

101. Mrs. LaRock submitted the winning bid for the **Sims2 Game** and paid a total of \$27.00 to Consumer Depot, using Consumer Depot's Auction Logistix payment service. *Id.* at ¶ 5 (SF 452) (UNDISPUTED).

102. When Mrs. LaRock's shipment arrived from Consumer Depot, it was incomplete and was missing Disk 1 from the game. *Id.* at ¶ 6 (SF 453) (UNDISPUTED).

103. The missing disk rendered the entire game useless, because it could not be loaded onto the computer, nor played without Disk 1. *Id.* (SF 454) (UNDISPUTED).

104. Mrs. LaRock attempted to remedy this problem with Consumer Depot by e-mail, but Consumer Depot simply kept sending her the same e-mail, telling her there were no refunds and to re-read the auction details. *Id.* at ¶ 7 (SF 455) (UNDISPUTED).

105. Mrs. LaRock reread the auction details and confirmed that Consumer Depot specifically represented that it had checked the **Sims2 Game** for all the CDs. *Id.* at ¶ 8 (SF 456) (UNDISPUTED IN PART).³³

106. Mrs. LaRock felt she had been defrauded by Consumer Depot. *Id.* at ¶ 9 (SF 457) (UNDISPUTED).³⁴

³³ Defendants admit Fact 105 (SF 456) in part and state "It is UNDISPUTED that the auction language contained the phrase to the following effect - "We checked this item for the CD/DVD only. We did not check for anything else!" It is UNDISPUTED that the auction language contained other verbiage. It is DISPUTED that Consumer Depot did not check the Sims2 Game for CDs." See DEF. RESP. TO SF 456. The statement that such representation was false has been omitted from this Finding of Fact.

³⁴ Defendants admit Fact 106 (SF 457) in part and state: "It is UNDISPUTED that Ms. LaRock feels the way she does, but it is DISPUTED that her feelings were reasonable or induced by Consumer Depot." See DEF. RESP. TO SF 457. There is no indication in Fact 457 that Ms. LaRock's feelings were reasonable or induced by Consumer Depot, and such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

(2) Consumer Barbara Layton

107. On November 5, 2005, consumer Barbara Layton visited Consumer Depot's eBay auction for its "returndealz04" auction site. *See* Layton Aff., ¶ 1, STATE'S EX. VOL. I, 59-66 (SF 173) (UNDISPUTED).

108. At that time, Ms. Layton saw that Consumer Depot was selling a **Texas Instruments Model 30XA Scientific Calculator** as item number 7559642164. *Id.* (SF 174) (UNDISPUTED).

109. **Figure 5,**³⁵ below, in an excerpt from the item description portion of Consumer Depot's eBay auction for the **Texas Instruments Model 30XA Scientific Calculator** purchased by Mrs. Layton:

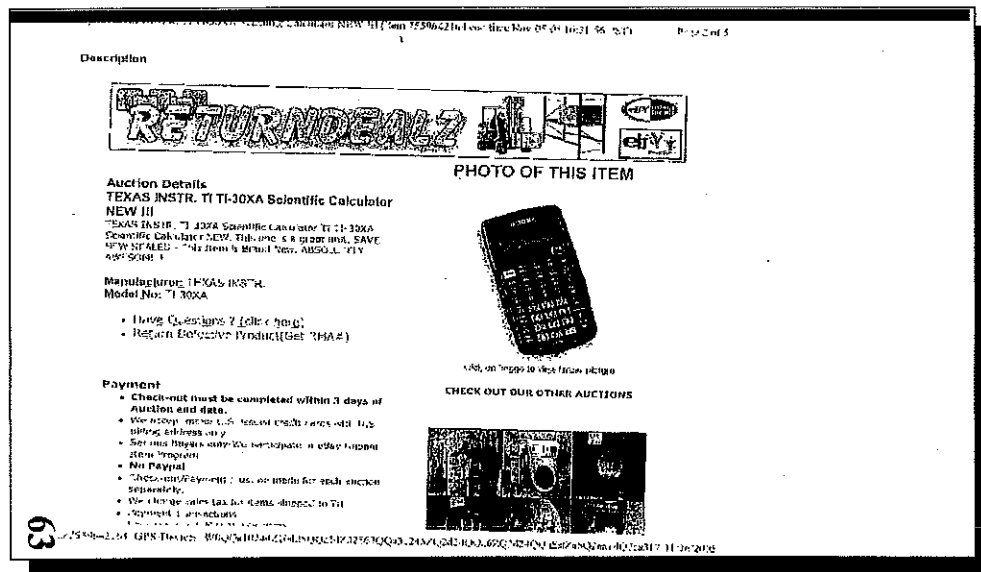


Figure 5

See Layton Aff. at ¶¶ 1-2 and Ex. A thereto, 59-66 (SF 175) (UNDISPUTED).

³⁵ Formerly **Figure 8** in State's Mem of Facts.

110. The 30XA Model was important to Ms. Layton, because her husband was an engineer and needed a “pi” key to perform certain calculations. *Id.* at ¶ 6 (SF 176) (UNDISPUTED).

111. Consumer Depot’s eBay advertisement referred to the 30XA Model at least five different times and included at least three photographs of the 30XA Model. *Id.* at ¶¶ 2-3 and Ex. A thereto (SF 177) (UNDISPUTED).

112. When Ms. Layton received her shipment from Consumer Depot, it contained a different model calculator which did not have a “pi” key. *Id.* at ¶ 6. (SF 178) (UNDISPUTED).

113. Mrs. Layton also tried to resolve the problem with Consumer Depot through eBay’s complaint resolution site, but was not successful in resolving the same. *Id.* at ¶ 7 (SF 180) (UNDISPUTED).

114. Mrs. Layton posted negative feedback about Consumer Depot on eBay stating it sent her the wrong item and failed to respond to her e-mails and Consumer Depot promptly posted negative feedback against Mrs. Layton. *Id.* at ¶ 8 (SF 181) (UNDISPUTED).

115. “This type of behavior by an eBay seller is intimidating and undoubtedly deters consumers from leaving negative feedback against Consumer Depot on eBay.” *Id.* (SF 607) (UNDISPUTED IN PART).³⁶

116. Mrs. Layton felt she was “misled and deceived by Consumer Depot.” *Id.* at ¶ 9.

³⁶ Defendants admit Fact 115 (SF 607) in part and state: “It is UNDISPUTED for purposes of this Motion that Ms. Layton feels as stated above, but it is DISPUTED that such feelings were reasonable or have been induced by Consumer Depot.” *See* Def. Resp. to SF 607. There is no assertion in Fact 607 that Ms. Layton’s feelings were reasonable or induced by Consumer Depot, and such inquiries would constitute legal conclusions that are not relevant to the issues presently before the Court.

(SF 182) (UNDISPUTED IN PART).³⁷

(9) Consumer Brian Lock

117. On July 8, 2004, consumer Brian Lock won defendants' eBay auction for Altec Lansing headphones. *See* Lock Aff., ¶¶ 1-4, STATE'S EX. VOL. I, 69-76 (SF 397) (UNDISPUTED).

118. Consumer Depot's eBay advertisement stated that the item "**works great**" and was still "**in its original box**" and **returnable within 7 days**. *Id.* at ¶ 2. *See also* p. 2 of Ex. A thereto (Copy of Consumer Depot's advertisement for this item from eBay's website.) STATE'S EX. VOL. I, 69-70 (SF 398) (UNDISPUTED IN PART).³⁸

119. Consumer Depot's auction photograph displayed the headphones in their original box. *Id.* at ¶ 2. *See also* p. 2 of Ex. A thereto (Copy of Consumer Depot's actual advertisement for this item from eBay's website.) STATE'S EX. VOL. I, 69-70 (SF 399) (UNDISPUTED IN PART).³⁹

120. When Mr. Lock received the headphones, they were "dead" and did not work. *Id.*

³⁷ Defendants admit Fact 116 (SF 182) and state "Ms. Layton's feelings are UNDISPUTED for purposes of this Motion, but it is DISPUTED that said feelings were reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO STATE'S FACTS, ¶ 182. There is no assertion in SF 182 that Ms. Layton's feelings were reasonable or induced by Consumer Depot, and such inquiries would constitute legal conclusions that are not relevant to the issues presently before the Court.

³⁸ Defendants admit Fact 118 (SF 398) in part and state "It is UNDISPUTED that the auction language contained the above verbiage, but it is DISPUTED that the above verbiage constituted the sum total of the said verbiage." *See* Def. Resp. to SF 398. There is no assertion in SF 398 that this verbiage constitutes the sum total of such verbiage, and the State has never made such an allegation in this case.

³⁹ Defendants admit Fact 119 (SF 399) in part and state "It is UNDISPUTED that the auction language contained the above verbiage, but it is DISPUTED that the above constituted the sum total of the said verbiage." *See* Def. Resp. to SF 399. As already noted in the immediately preceding footnote, there is no assertion by the State that the above constitutes the sum total of such verbiage, and the State has never made such an allegation in this case.

at ¶ 5 (SF 400) (UNDISPUTED).

(10) Consumer John Machata

121. On September 5, 2005, consumer John Machata won defendants' eBay auction for two Panasonic cordless telephones. *See Machata Aff.*, ¶¶ 1-5, STATE'S EX. VOL. I, 77-84 (SF 314) (UNDISPUTED).

122. When Mr. Machata received the telephones, however, they were both broken and covered in dirt. *Id.* ¶ 6 (SF 316) (UNDISPUTED).

123. One phone could not be charged at all, and the other phone would not work even after being charged for the requisite eighteen hours. *Id.* (SF 317) (UNDISPUTED).

124. Mr. Machata posted negative feedback about Consumer Depot on eBay, and Consumer Depot promptly . . . post[ed] negative feedback about Mr. McDermott on eBay. *Id.* at ¶ 10 (SF 319) (UNDISPUTED IN PART).⁴⁰

(11) Consumer Chris Martin

125. On July 22, 2005, consumer Chris Martin visited Consumer Depot's website at www.consumerdepot.com, and decided to buy some Maxell headphones. *See Martin Aff.*, ¶ 1, STATE'S EX. VOL. I, 85-87 (SF 201 and 294) (UNDISPUTED IN PART).⁴¹

126. Consumer Depot's website advertisement stated that the Item Condition was

⁴⁰ Defendants admit Fact 124 (SF 319) in part and state "It is UNDISPUTED for purposes of this Motion that negative feedback was left by both parties, but DISPUTES that Consumer Depot 'retaliated.'" *See* Def. Resp. to SF 319. The reference to retaliation has therefore been omitted from this Finding of Fact.

⁴¹ Defendants admit Facts 125 (SF 201 and 294) except as to the date, which defendants state should be "2005." *See* DEF. RESP. TO STATE'S FACTS, ¶ 201 and ¶ 294. This change has made in Fact 125.

“New/Open Box: Complete, in Original Packaging with All Accessories,” and that the headphones came with a **fourteen-day warranty**. *Id.* (SF 202 and 295) (UNDISPUTED).

127. Mr. Martin decided to go ahead and buy three sets of Maxell headphones from Consumer Depot. *Id.* at ¶ 2. (SF 203 and 296) (UNDISPUTED).

128. When Mr. Martin received his headphones, however, they were not **“New/Open Box,”** but were all visibly defective. *Id.* ¶ 3 (SF 204 and 297) (UNDISPUTED).

129. More particularly, each box for each headphone was clearly labeled **“RETURN,”** and each box had the exact defect written out and described on the **“RETURN”** label. *Id.* at ¶ 3. (SF 205 and 298) (UNDISPUTED).

130. The next day Mr. Martin attempted to contact Consumer Depot via e-mail to express his dissatisfaction, but Consumer Depot responded with an automated message stating it would refund the original purchase price and shipping charges for defective items, but that he had to get an **“RMA”** (return merchandise authorization). *Id.* ¶ 4. (SF 206 and 299) (UNDISPUTED).

131. When Mr. Martin went to get an RMA, Consumer Depot’s RMA form said that he would get a store credit only, and that Consumer Depot would *not* refund his original shipping chargers. *Id.* at ¶ 5 (SF 207 and 300) (UNDISPUTED).

132. Mr. Martin never received a refund from Consumer Depot. *Id.* at ¶ 7. (SF 209 and 302) (UNDISPUTED).

(12) Consumer Marvin McDermott

133. On November 18, 2005, consumer Marvin McDermott won defendants’ eBay auction for a DVD of the movie **“Ghost Ship.”** *See* McDermott Aff., ¶ 1, STATE’S EX. VOL. I, **88-95**

(SF 210 and 303) (UNDISPUTED).

134. Figure 6,⁴² below, is an excerpt from the auction description for the auction viewed by Mr. McDermott and includes terms such as “Brand New” and “*SEALED*:

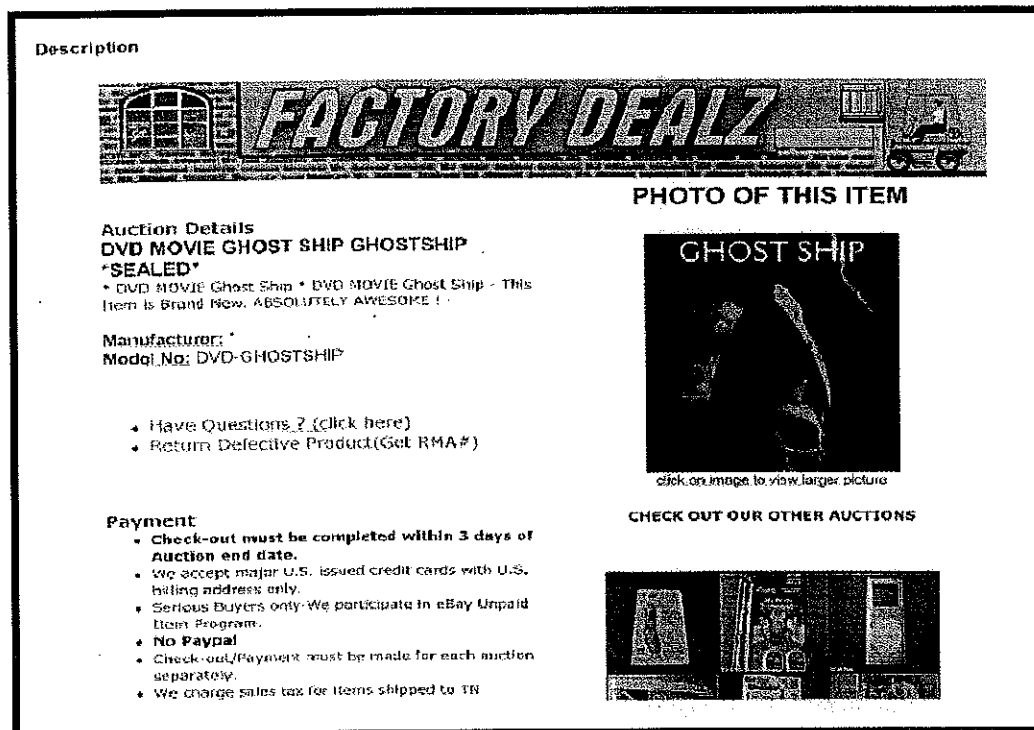


Figure 6

Id. at ¶¶ 2-6 and Ex. A thereto, 88-95. (SF 211 and 304) (UNDISPUTED).

135. Another descriptive logo and banner used by Consumer Depot in its eBay advertising is the FACTORY DEALZ banners, as set for in Figure 7,⁴³ below:

⁴² Formerly Figure 12 and Figure 14 in State's Mem of Facts.

⁴³ Formerly Figure 10 in State's Mem of Facts.



PHOTO OF THIS ITEM

Figure 7

See, e.g., Ex. 1 to McDermott Aff., STATE'S EX. VOL. I, 92-95 (SF 125) (UNDISPUTED).

136. Mr. McDermott tried to contact Consumer Depot by telephone and through the internet, but could not get any meaningful response. *Id.* at ¶ 7. (SF 214 and 307) (UNDISPUTED).

137. Eventually Mr. McDermott reached Consumer Depot, but Consumer Depot told him there was nothing it could do. *Id.* (SF 215 and 308) (UNDISPUTED).

138. Mr. McDermott went to the eBay auction site and saw that there were many other consumers who had complained of wet and moldy products from Consumer Depot. *Id.* at ¶ 8 (SF 216 and 309) (UNDISPUTED).

139. Mr. McDermott also observed that every time a consumer posted negative feedback against Consumer Depot on eBay, Consumer Depot promptly posted negative feedback against the consumer. *Id.* (SF 217 and 310) (UNDISPUTED IN PART).⁴⁴

140. Mr. McDermott simply posted "neutral" feedback against Consumer Depot. *Id.*

⁴⁴ Defendants admit Fact 139 (SF 217 and 310) in part and state "UNDISPUTED for purposes of this Motion what Mr. McDermott might have said he observed, but it is DISPUTED that Consumer Depot "retaliated." *See* DEF. RESP. TO SF 217 AND 310. The reference to retaliation has therefore been omitted from Finding of Fact 139.

(SF 218 and 312) (UNDISPUTED IN PART).⁴⁵

(13) Consumer Albert Monson

141. On May 17, 2005, consumer Albert Monson, Jr. visited Consumer Depot's eBay auction site to purchase a "World of Warcraft" game for his nine year old son. *See* Monson Aff. ¶ 1, STATE'S EX. VOL. I, **96-97** (SF 458) (UNDISPUTED).

142. Consumer Depot's eBay advertisement displayed a World of Warcraft game and stated that it came from a "**HUGE Million Dollar software Liquidation.**" *Id.* at ¶ 2 (SF 459) (UNDISPUTED).

143. When Mr. Monson received the software and tried to load it on his computer, he discovered that it was already registered to someone else, and therefore completely unusable. *Id.* at ¶ 6 (SF 461) (UNDISPUTED).

(14) Consumer Chris Meyers

144. In mid-April 2005, consumer Chris Myers won defendants' eBay auction for a **Sirius Boombox**. *See* Myers Aff., ¶¶ 1-3, STATE'S EX. VOL. I, **118-23** (SF 320) (UNDISPUTED).

145. When Mr. Myers received the **Sirius Boombox** from Consumer Depot, the antenna was broken and the wrong power cord had been provided. *Id.* at ¶ 4 (SF 322) (UNDISPUTED).

146. Mr. Myers tried to run the **Sirius Boombox** on batteries only, but the boombox still did not work. *Id.* (SF 323) (UNDISPUTED).

⁴⁵ Defendants admit Fact 141 (SF 218 and 312) in part and state "UNDISPUTED for purposes of this Motion what Mr. McDermott might have felt, but it is DISPUTED that Consumer Depot retaliated." *See* DEF. RESP. TO STATE'S FACTS 218 and 312. The reference to retaliation has been omitted from this Finding of Fact 141.

147. Mr. Myers then saw that Consumer Depot's eBay return policy stated it would not refund shipping charges, and he did not want to spend his own money returning a defective item. *Id.* at ¶ 6 (SF 325) (**UNDISPUTED IN PART**).⁴⁶

148. Mr. Myers was also concerned that if he returned the item, Consumer Depot would just turn around and sell it to another [consumer]. *Id.* (SF 326) (**UNDISPUTED IN PART**).⁴⁷

(15) **Consumer Katrina Moultrie**

149. On December 30, 2005, consumer Katrina Moultrie visited the eBay internet site and saw that Consumer Depot, through its "**returndealz04**" user id, was selling a **Kaleidoscope [PA] - Kelis (CD 1999) CD NEW** through auction, as item number 4813510411. *See* Moultrie Aff. ¶ 1 and Ex. A thereto, STATE'S EX. VOL. I, **98-109** (SF 126) (**UNDISPUTED**).

150. **Figure 8**,⁴⁸ below, is an excerpt from the first screen of the eBay auction that Ms. Moultrie viewed:

⁴⁶ Defendants admit Fact 147 (SF 325) in part and state "It is **UNDISPUTED** for purposes of this Motion of what Mr. Myers saw of Consumer Depot's eBay return policy and **UNDISPUTED** as to whether or not he wanted to spend his own money, but it is **DISPUTED** that the item had been fraudulently sold in the first place." *See* Def. Resp. to SF 325. The reference to the item being fraudulently sold in the first place has been omitted from Finding of Fact 147.

⁴⁷ Defendants admit Fact 148 (SF 326) in part and state "It is **UNDISPUTED** for purposes of this Motion as to what Mr. Myers might have felt, but **DISPUTED** as to the characterization of "victim." *See* Def. Resp. to SF 326. The reference to "unsuspecting victim" has therefore been omitted from Finding of Fact 148.

⁴⁸ Formerly identified as **Figure 3** in State's Mem of Facts.

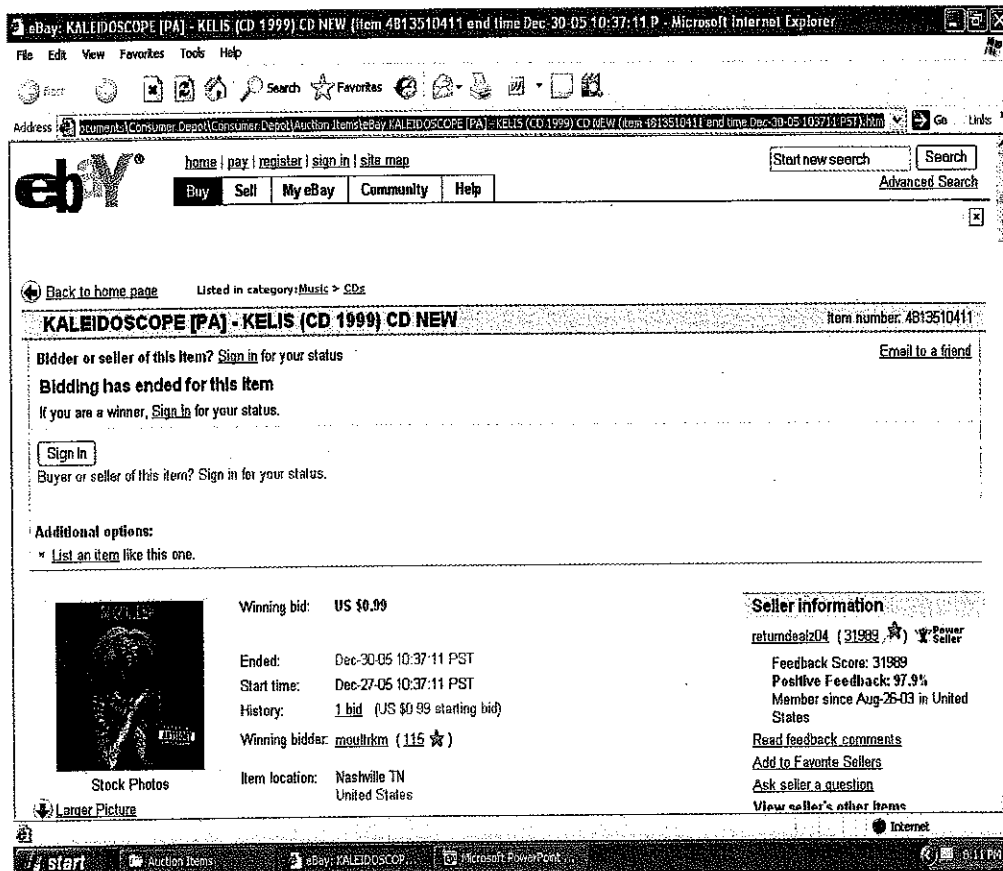


Figure 8

Id. (SF 127) (UNDISPUTED).

151. Consumer Depot's eBay auction for Ms. Moultrie's KELIS CD stated:

Auction Details

cd is new but case is cracked - Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The Photo above is the item you are bidding on.

- Have questions? Click here!
- Return defective product (Get RMA#)

Id. at ¶ 2 and Ex. A at 2, STATE'S EX. VOL. I, 98-99 and 102 (SF 128) (UNDISPUTED).

152. In addition to the above description, Consumer Depot also posted a photograph of the KELIS CD, which stated it was a stock photo. *Id.* (SF 129) (UNDISPUTED).

153. Figure 9,⁴⁹ below, is an excerpt from the auction description page Ms. Moultrie viewed, as described above.

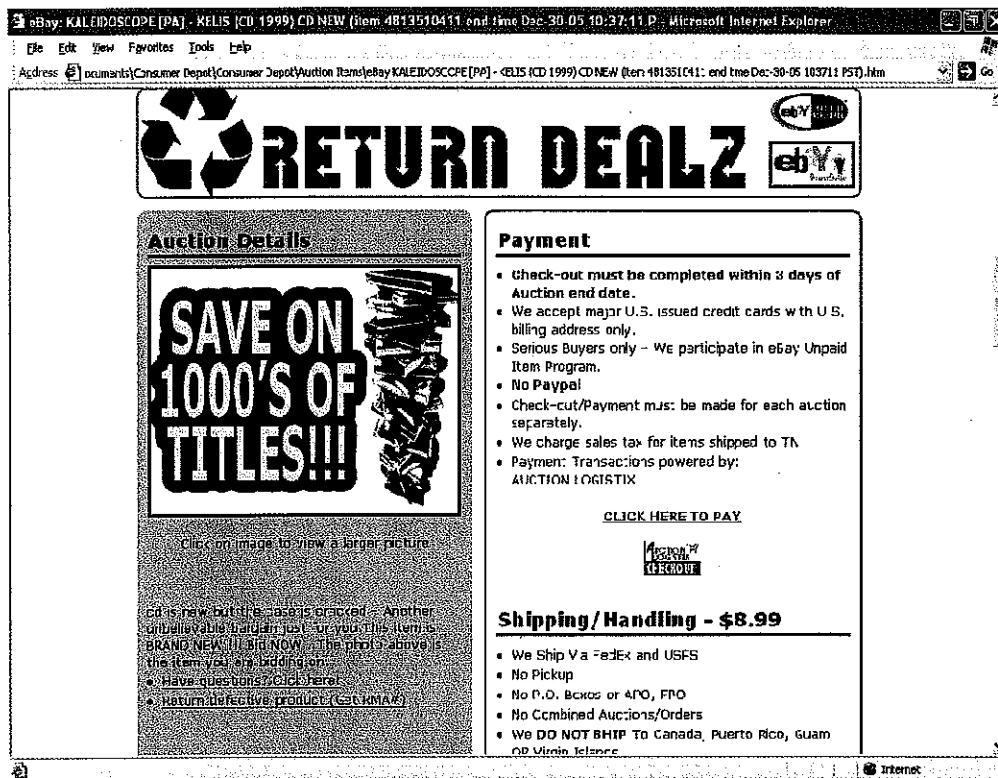


Figure 9

Id. at ¶ 2 and Ex. A at p. 2, STATE'S EX. VOL. I, 98-99 and 102 (SF 130) (UNDISPUTED).

154. On December 30, 2005, Ms. Moultrie submitted the winning bid for Consumer Depot's **Kelis CD** and paid a total of \$ 9.98 for the item: \$.99 for the winning bid and \$8.99 for shipping. *Id.* ¶ 4 (SF 132) (UNDISPUTED).

155. Consumer Depot's above description and photograph led Ms. Moultrie to believe that the **Kelis CD** it was selling was "Brand New" and still in its original packaging,

⁴⁹ Formerly Figure 4 in State's Mem of Facts.

and that if there was a problem, she could return the CD by clicking the “● **Return defective product (Get RMA#)**” link in the auction description. *Id.* ¶ 3 and Ex. A at 2, STATE’S EX.

VOL. I, 99 and 102 (SF 131) (UNDISPUTED IN PART).⁵⁰

156. When Ms. Moultrie’s KELIS CD arrived from Consumer Depot, the CD smelled musty even before she even opened the seal. *Id.* ¶ 5 (SF 133) (UNDISPUTED).

157. When Mrs. Moultrie opened the seal and opened the CD, it was wet inside. *Id.* (SF 134) (UNDISPUTED).

158. In addition, the insert in the CD was wet and stuck to the inside of the case. *Id.* (SF 135) (UNDISPUTED).

159. Ms. Moultrie promptly went to the Consumer Depot site to return the Kelis CD. *Id.* ¶ 6. (SF 136) (UNDISPUTED).

160. Ms. Moultrie clicked the prominent “● **Return defective product (Get RMA #)**” link at the end of the auction details and entered her auction number as directed by Consumer Consumer Depot’s site. *Id.* (SF 137) (UNDISPUTED).

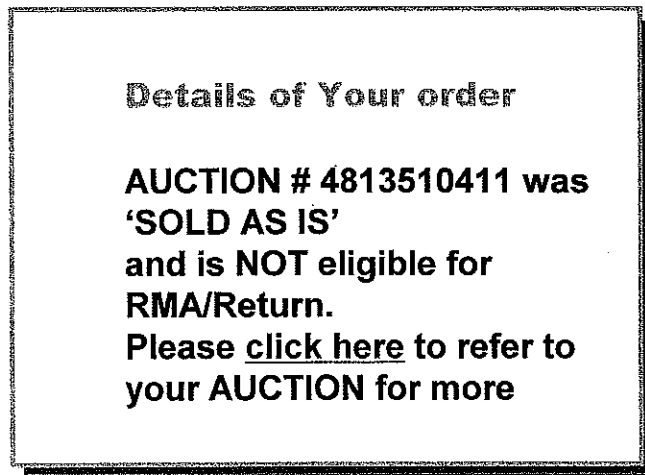


Figure 10

161. However, after Ms. Moultrie

⁵⁰ Defendants admit Fact 155 (SF 131) in part and state “UNDISPUTED for purposes of this Motion as to Ms. Moultrie’s feelings, but it is DISPUTED that said feelings were reasonable or arose out of the conduct of Consumer Depot. *See* DEF. RESP. TO STATE’S FACTS, ¶ 131. There is no assertion in Fact 155 that Ms. Moultrie’s feelings were reasonable or induced by Consumer Depot. Such inquiries would constitute legal conclusions that are not relevant to the issues presently before the Court.

entered her auction number, Consumer Depot displayed a message as set forth in **Figure 10**, right. *Id.*, and see Ex. B thereto, STATE'S EX. VOL. I, **107** (SF 138) (**UNDISPUTED**).⁵¹

162. Ms. Moultrie thought it was very misleading for Consumer Depot to place a link for returning defective products next to the auction description of the item on the one hand, and then to place a separate "As-Is" and "No Returns" message in a separate portion of the auction page next to photographs of unrelated auction items. *Id.* (SF 140) (**UNDISPUTED IN PART**).⁵²

163. Ms. Moultrie decided to leave negative feedback about Consumer Depot on eBay, but as soon as she did, Consumer Depot . . . left negative feedback against her which was false. *Id.*, **108** (SF 142) (**UNDISPUTED in Part**).⁵³

164. As seen in Ms. Moultrie's attached eBay Member Profile, Ms. Moultrie had a perfect 100% positive feedback rating with eBay for her eBay transactions until Consumer Depot left negative feedback. See Moultrie Aff. ¶ 7 and member profile for **moultrkm**, STATE'S EX. VOL. I, **100 and 108** (SF 144) (**UNDISPUTED**).

165. As a result of Consumer Depot's negative feedback, Ms. Moultrie's eBay

⁵¹ Formerly **Figure 5** in State's Mem of Facts.

⁵² Defendants admit Fact 162 (SF 140) in part and state "It is **UNDISPUTED** for purposes of this motion what Ms. Moultrie thought, but it is **DISPUTED** that her thoughts were reasonable or arose out of the conduct of Consumer Depot. See DEF. RESP. TO SF 140. No reference to the reasonableness of Ms. Moultrie's "thoughts" is included in Fact 163, nor that they arose out of the conduct of Consumer Depot. Further, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

⁵³ Defendants admit Fact 163 (SF 142) in part and state "**UNDISPUTED** for purposes of this Motion that both parties left negative feedback against the other, but it is **DISPUTED** that by doing so Consumer Depot "retaliated." See Def. Resp. to SF 142. Ms. Moultrie's statement that Consumer Depot retaliated has therefore been omitted from Fact 163.

feedback rating has dropped and so has her 100% positive reputation. *Id.* (SF 145)

(UNDISPUTED).

166. Ms. Moultrie has since reviewed the eBay website and observed that there were many other consumers who have had equally bad experiences with Consumer Depot. *Id.*

¶ 8. (SF 146) **(UNDISPUTED).**

167. Ms. Moultrie also observed that each time one of these consumers left negative feedback left against Consumer Depot, Consumer Depot . . . left negative feedback against the consumer. *Id.* (SF 147) **(UNDISPUTED IN PART).**⁵⁴

168. Consumer Depot has failed to refund [Ms. Moultrie's] money. *Id.* ¶ 9 (SF 148) **(UNDISPUTED IN PART).**⁵⁵

169. Ms. Moultrie felt she was misled and deceived by Consumer Depot. *Id.* (SF 149) **(UNDISPUTED IN PART).**⁵⁶

(16) Consumer Mark Muto

170. On February 9, 2005, consumer Mark Muto visited Consumer Depot's

⁵⁴ Defendants admit Fact 167 (SF 147) in part and state "UNDISPUTED for purposes of this Motion as to what Ms. Moultrie believed, but it is DISPUTED that Consumer Depot "retaliated" by leaving negative feedback. *See* DEF. RESP. TO SF 147. Ms. Moultrie's reference to "retaliation" by Consumer Depot has been omitted from Fact 167.

⁵⁵ Defendants admit Fact 168 (SF 148) in part and state "UNDISPUTED that Consumer Depot did not refund Ms. Moultrie's money for a SOLD AS IS CD, but DISPUTED that Consumer Depot did not reply." *See* DEF. RESP. TO SF 148. Ms. Moultrie's reference to Consumer Depot's failure to respond to her emails has been omitted from this statement.

⁵⁶ Defendants admit Fact 170 (SF 149) in part and state "Ms. Moultrie's feelings are UNDISPUTED for purposes of this Motion, but it is DISPUTED that said belief was reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO SF 149. There is no indication in Fact 170 (SF 149) that Ms. Moultrie's feelings were reasonable or arose out of Consumer Depot's conduct. Moreover, such inquiries are involve legal conclusions that are not relevant to the issues presently before the Court.

"bargaindepot04" eBay auction site. *See* Muto Aff., ¶ 1, STATE'S EX. VOL. I, 110-17 (SF 159) (UNDISPUTED).

171. At that time, Mr. Muto saw that Consumer Depot was selling a **Belkin 2-Port KVM Switch F1DL102U USB Cables** for auction as item number 5163638389. *Id.* (SF 160) (UNDISPUTED).

172. **Figure 11**,⁵⁷ below, is an excerpt from the item description portion of Consumer Depot's eBay auction for the **Belkin 2-Port KVM Switch** purchased by Mr. Muto:

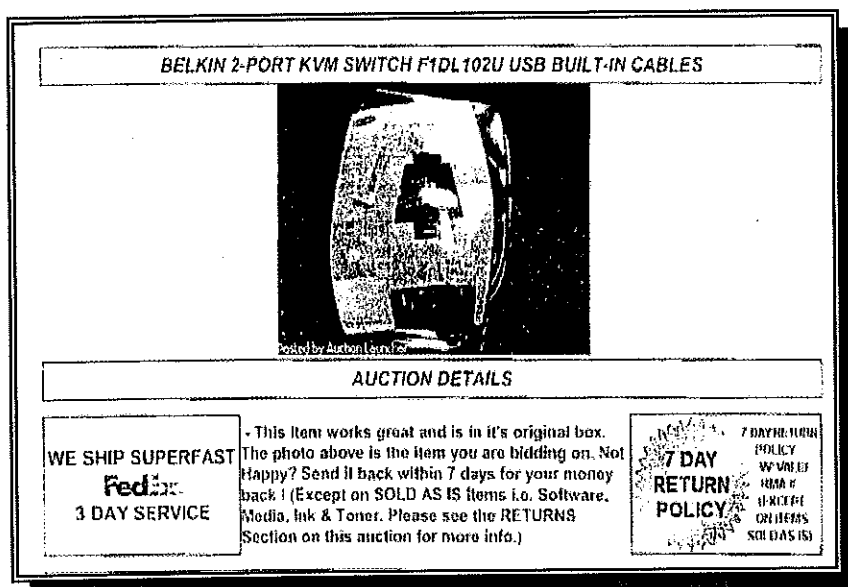


Figure 11

Id. at ¶¶ 1-4, 114 (SF 161) (UNDISPUTED).

173. On February 9, 2005, Mr. Muto submitted the winning bid for the above **Belkin 2-Port KVM Switch**. *Id.* at ¶ 5, 162 (SF 125) (UNDISPUTED).

⁵⁷ Formerly **Figure 7** in State's Mem of Facts.

174. When Mr. Muto received his shipment from Consumer Depot, his package did not contain the **Belkin 2-Port KVM Switch** at all, but, instead, contained *an entirely different, incompatible PS2 computer switch*. *Id.* at ¶ 6, 163 (SF 125) (UNDISPUTED).

175. Mr. Muto went ahead and shipped the wrong item back to Consumer Depot at his own expense and did so within seven days from the date he first received the item from Consumer Depot. *Id.* ¶ 8 (SF 167) (UNDISPUTED).

176. Consumer Depot refused to accept Mr. Muto's return, claiming it had not "received" his return within seven days of Mr. Muto's receipt of the item. *Id.* (SF 168) (UNDISPUTED).

177. At most, Mr. Muto estimates Consumer Depot would have received his return within eight or nine days at the most, from the date he originally received the item. *Id.* (SF 169) (UNDISPUTED).

178. Mr. Muto was very unhappy with Consumer Depot and posted negative feedback about Consumer Depot on eBay. *Id.* at ¶ 9 (SF 170) (UNDISPUTED).

179. Mr. Muto felt that he had been defrauded by Consumer Depot. *Id.* at ¶ 10 (SF 172) (UNDISPUTED IN PART).⁵⁸

(17) **Consumer Dhamija Pradeep**

180. On January 2, 2004, consumer Dhamija Pradeep won defendants' eBay auction

⁵⁸ Defendants admit Fact 179 (SF 172) in part and state "Mr. Muto's feelings are UNDISPUTED for purposes of this Motion, but it is DISPUTED that said feelings were reasonable or arose out of the conduct of Consumer Depot. *See* DEF. RESP. TO STATE'S FACTS, ¶ 172. No reference to the reasonableness of Mr. Muto's feelings is included in this statement. Further, such inquiries are involve legal conclusions that are not relevant to the issues presently before the Court.

for a Canon Black Toner Cartridge. *See* Pradeep Aff., ¶¶ 1-5 and Ex. A thereto, STATE'S EX. VOL. I, 124-26 (SF 370) (UNDISPUTED).

181. Before Mr. Pradeep bid on this cartridge, he e-mailed Consumer Depot to find out more about it, and told Consumer Depot he did not want to end up with an empty cartridge. *Id.* at ¶ 2 (SF 371) (UNDISPUTED).

182. In his Affidavit, Mr. Pradeep states:

[W]hile I understood that there was a possibility that the toner cartridge might not work or be damaged, I still thought it would have value for me if it was full of toner, since I could possibly extract the toner or fix the cartridge.

Id. at ¶ 4 (SF 374) (UNDISPUTED IN PART).⁵⁹

183. When Mr. Pradeep received his toner cartridge from Consumer Depot, it was completely empty and had obviously been used. *Id.* at ¶ 6. (SF 375) (UNDISPUTED).

184. In his Affidavit, Mr. Pradeep notes that an empty toner cartridge weighs approximately ½ lb. less than a full cartridge. *Id.* at ¶ 7. (SF 376) (UNDISPUTED).

185. Mr. Pradeep tried to get a credit from Consumer Depot, but Consumer Depot refused. *Id.* at ¶ 8. (SF 378) (UNDISPUTED).

186. Mr. Pradeep wrote approximately eight or nine e-mails to Consumer Depot trying to resolve this problem, but Consumer Depot refused all attempts at amicable

⁵⁹ Defendants admit Fact 182 (SF 374) in part and state "It is UNDISPUTED as to what Mr. Pradeep stated, but it is DISPUTED that he had no reason to believe that the toner cartridge would be empty or that Consumer Depot stated nothing to such fact in its eBay description or in response to his email." *See* DEF. RESP. TO SF 374. Reference to Mr. Pradeep's statement that he had no reason to believe that the toner cartridge would be empty or that Consumer Depot stated nothing to such fact in its eBay description or in response to his email has been omitted from Finding of Fact 182.

resolution. *Id.* at ¶ 8. (SF 379) (UNDISPUTED).

187. Mr. Pradeep posted negative feedback about Consumer Depot on eBay and Consumer Depot promptly posted negative feedback about Mr. Pradeep on eBay. *Id.* at ¶ 9. (SF 380) (UNDISPUTED).

(18) Consumer George Reisdorf

188. On February 23, 2006, consumer George Reisdorf visited eBay's internet auction site and saw that Consumer Depot, through its "**bargaindepot04**" eBay user id was selling **RCA WHP140 900 MHZ Wireless Stereo Headphones** through auction as item number 7592810222. *See* Reisdorf Aff., ¶ 1, STATE'S EX. VOL. II, 605-11 (SF 576) (UNDISPUTED).

189. Consumer Depot's eBay auction advertisement for the RCA Wireless Headphones stated "**This item works and looks great!**" *Id.* ¶ 2, 609 (SF 577) (UNDISPUTED IN PART).⁶⁰

190. Consumer Depot's advertising did not mention or disclose any problems or defects with the RCA Wireless Headphones. *Id.* (SF 579) (UNDISPUTED).

191. On February 23, 2006, Mr. Reisdorf submitted the winning bid for the **RCA Wireless Headphones** and paid Consumer Depot a total of \$14.99: \$.99 for the item and \$14.00 for shipping. *Id.* ¶ 3 (SF 580) (UNDISPUTED).

⁶⁰ Defendants admit Fact 189 (SF 577) in part and state "It is UNDISPUTED that the auction language contained the above language, but it is DISPUTED that such was the sum total of it." *See* Def. Resp. to SF 577. There is no assertion by the State that the advertising statement set forth in fact 190 constituted the sum total of the above auction language, and the State has not alleged this in this case. Moreover, the State included Ex. A to Mr. Reisdorf's affidavit, which sets forth the entire eBay auction involved in Mr. Reisdorf's transaction, which defendants do not dispute.

192. When Mr. Reisdorf's **RCA Wireless Headphones** arrived from Consumer Depot, they were not as advertised. *Id.* ¶ 4 (SF 581) (**UNDISPUTED**).

193. The transmitter in the RCA Wireless Headphones kept shorting out, making the headphones useless. *Id.* (SF 582) (**UNDISPUTED**).

194. Mr. Reisdorf sent e-mails to Consumer Depot asking it to replace the headphones, but Consumer Depot sent him an automated message telling him that Consumer Depot did not replace broken items, but would refund the purchase price and shipping if he returned the headphones within seven days with an RMA form. *Id.* ¶ 5 (SF 583) (**UNDISPUTED**).

195. Mr. Reisdorf filled out the RMA form, but when he learned it would cost between \$10.00 to \$15.00 to ship the headphones back to Consumer Depot, he decided it wasn't worth it. *Id.* (SF 584) (**UNDISPUTED**).

196. Mr. Reisdorf later saw that the RMA form Consumer Depot provided to him contradicted the emails Consumer Depot sent him, and did not provide for a refund of shipping costs. *Id.* (SF 585) (**UNDISPUTED**).

197. Knowing that Consumer Depot issued . . . negative feedback against complaining consumers, Mr. Reisdorf left neutral feedback against Consumer Depot on eBay. *Id.* ¶ 6 (SF 587) (**UNDISPUTED IN PART**).⁶¹

198. Consumer Depot responded by leaving neutral feedback on eBay against Mr. Reisdorf, which Mr. Reisdorf felt was retaliatory because he deserved positive feedback. *Id.*

⁶¹ Defendants admit Fact 197 (SF 587) in part and state "UNDISPUTED for purposes of this Motion, except as to the contention of "retaliatory," which is DISPUTED." See DEF. RESP. TO SF 587. The reference to retaliation has therefore been omitted from Fact 197.

(SF 588) (UNDISPUTED).

199. Mr. Reisdorf felt he had been defrauded, deceived and misled by Consumer Depot. *Id.* at ¶ 7 (SF 589) (UNDISPUTED IN PART).⁶²

(19) Consumer Ralph Schuler

200. On October 19, 2004, consumer Ralph Schuler won defendants' eBay auction for two lots of **Lexmark Ink Cartridges**. *See* Schuler Aff., ¶¶ 1-4, STATE'S EX. VOL. I, 127 - 34 (SF 360) (UNDISPUTED).

201. Consumer Depot's written description of the **Lexmark Ink Cartridge** stated it was "**GENUINE**," and that "**Someone is going to get a DEAL!!**" *Id.* (SF 362) (UNDISPUTED IN PART).⁶³

202. Mr. Schuler paid a total of \$71.00 for the ink cartridges. *Id.* at ¶ 4 (SF 363) (UNDISPUTED).

203. When Mr. Schuler received his package from Consumer Depot, however, he was shocked to find that only used and empty ink cartridges had been thrown in loose in a Federal Express box, without any protective packaging and without their boxes. *Id.* at ¶ 5 (SF 364) (UNDISPUTED).

⁶² Defendants admit Fact 199 (SF 589) in part and state "It is UNDISPUTED what Mr. Reisdorf felt, but it is DISPUTED that such feelings were reasonable or induced by Consumer Depot." *See* DEF. RESP. TO SF 589. There is no indication in Fact 589 that Mr. Reisdorf's feelings were reasonable or induced by Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

⁶³ Defendants admit Fact 201 (SF 362) 450 in part and state "It is UNDISPUTED that the auction language displays, but the above is but a small part of the total auction language." *See* DEF. RESP. TO SF 362. There is no assertion by the State that this advertising statement constitutes the sum total of the auction language viewed by Mr. Schuler, and the State has not made such an allegation in this case.

204. In his Affidavit, Mr. Schuler states he feels that Consumer Depot's advertising was false and misleading, and that he had been completely defrauded by Consumer Depot. *Id.* at ¶ 8 (SF 365) (UNDISPUTED IN PART).⁶⁴

205. Mr. Schuler states that he would have never spent \$71.00 for empty ink cartridges, and Consumer Depot should have advertised the cartridges as "used and refillable," or "used and empty," but not as "GENUINE" ink cartridges along with a photograph of an ink cartridge in a new, unopened box. *Id.* at ¶¶ 6-8 (SF 366) (UNDISPUTED IN PART).⁶⁵

206. Mr. Schuler feels that he paid \$71.00 for something that might have been worth \$5.00 at most. *Id.* at ¶ 6 (SF 367) (UNDISPUTED IN PART).⁶⁶

207. Mr. Schuler posted negative feedback about Consumer Depot on eBay. Consumer Depot promptly . . . posted negative feedback about him on eBay. *Id.* at

⁶⁴ Defendants admit Fact 204 (SF 365) in part and state "It is UNDISPUTED as to what Mr. Schuler feels, but it is DISPUTED that his feelings were reasonable or induced by Consumer Depot." See DEF. RESP. TO SF 365. There is no indication in Fact 204 (SF 365) that Mr. Schuler's feelings were reasonable or induced by Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

⁶⁵ Defendants admit Fact 205 (SF 366) in part and state "It is UNDISPUTED as to what Mr. Schuler feels, but it is DISPUTED that his feelings were reasonable or induced by Consumer Depot." See DEF. RESP. TO SF 366. There is no indication in Fact 205 (SF 366) that Mr. Schuler's feelings were reasonable or induced by Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

⁶⁶ Defendants admit Fact 206 (SF 367) in part and state "It is UNDISPUTED as to what Mr. Schuler feels, but it is DISPUTED that his feelings were reasonable or induced by Consumer Depot." See DEF. RESP. TO SF 367. There is no indication in Fact 206 (SF 367) that Mr. Schuler's feelings were reasonable or induced by Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

¶ 7 (SF 369) (UNDISPUTED IN PART).⁶⁷

(20) Consumer Steven Streiff

208. On January 31, 2004, Mr. Streiff visited the eBay's internet site and saw that Consumer Depot, through its "surplusdealz05" eBay user id, was offering two **Lexmark 140109A Toner Cartridge -HP C3909** items (hereinafter "**Lexmark 140109A Toner Cartridges**") for auction as item numbers 3456489114 and 3456608476. *See* Streiff Aff., ¶ 1 and Ex. A thereto, STATE'S EX. VOL. II, 622-27 (SF 267) (UNDISPUTED).

209. In addition, Consumer Depot published photographs of the LEXMARK Cartridges. *Id.* at ¶ 4 (SF 269) (UNDISPUTED).

210. Based of Consumer Depot's advertising, Mr. Streiff believed that the **Lexmark 140109A Toner Cartridges** were in good condition and were functional, because they were represented as a "bargain," and as items that would save money. *Id.* ¶ 4 (SF 270) (UNDISPUTED IN PART).⁶⁸

211. On January 31, 2004, Mr. Streiff submitted the winning bids for the two Consumer Depot **Lexmark 140109A Toner Cartridges-HP C3909**, item numbers 3456489114 and 3456608476. *Id.* at ¶ 5 (SF 271) (UNDISPUTED).

⁶⁷ Defendants admit Fact 207 (SF 369) in part and state "UNDISPUTED for purposes of this Motion, except as to the contention of "retaliatory, which is DISPUTED." *See* DEF. RESP. TO SF 369. The reference to retaliation has therefore been omitted from Fact 207.

⁶⁸ Defendants admit Fact 210 (SF 270) in part and state "It is UNDISPUTED for purposes of this Motion what Mr. Streiff claims to believe, but it is DISPUTED that said belief was reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO SF 270. There is no indication in Fact 210 (SF 270) that Mr. Streiff's belief was reasonable or arose out of the conduct of Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

212. Mr. Streiff spent a total of \$28.02 with Consumer Depot for the cartridges: \$.01 for each cartridge and another \$14.00 to ship each cartridge. *Id.* (SF 272) (UNDISPUTED).

213. When Mr. Streiff's **Lexmark 140109A Toner Cartridges** arrived from Consumer Depot, both were defective. *Id.* ¶ 6 (SF 273) (UNDISPUTED).

214. *Both cartridges arrived with a label attached to them which clearly stated "DEFECTIVE."* *Id.* (SF 274) (UNDISPUTED).

215. Both **Lexmark 140109A Toner Cartridges** were completely useless to Mr. Streiff. *Id.* (SF 275) (UNDISPUTED).

216. Mr. Streiff also noted that none of the photographs of the **Lexmark 140109A Toner Cartridges** showed *the prominent "DEFECTIVE" labels on them.* *Id.* at ¶ 7 (SF 278) (UNDISPUTED).

217. Consumer Depot refused to give Mr. Streiff a refund for the \$28.02 he spent for the **Lexmark 140109A Toner Cartridges**, even after they were contacted by the Tennessee Division of Consumer Affairs. *Id.* ¶ 8. (SF 279) (UNDISPUTED).

218. Mr. Streiff felt Consumer Depot knew or should have known that the two **Lexmark 140109A Toner Cartridges** to him were defective and unusable. *Id.* ¶ 9 (SF 280) (UNDISPUTED IN PART).⁶⁹

219. Mr. Streiff felt Consumer Depot should have clearly disclosed the fact the cartridges were defective before selling these cartridges to unsuspecting consumers on eBay.

⁶⁹ Defendants admit Fact 218 (SF 280) in part and state "It is UNDISPUTED as to what Mr. Streiff felt, but it is DISPUTED that Consumer Depot knew or should have known that the two cartridges were defective and unusable." *See* DEF. RESP. TO SF 280. Fact 218 (SF 280) is limited to Mr. Streiff's feelings only. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

Id. (SF 281) (UNDISPUTED IN PART).⁷⁰

220. Mr. Streiff felt he had been deceived and misled by Consumer Depot. *Id.* (SF 282) (UNDISPUTED IN PART).⁷¹

(27) Consumer Ernest Stein

223. On May 7, 2006, consumer Ernest Stein visited eBay's internet auction site where he saw that Consumer Depot, through its "bargaindepot04" user id, had placed a **CANON IP3000 PIXMA COLOR PHOTO PRINTER *SAVE BIG*** on eBay for auction as item number 6878290477. *See* Stein Aff., ¶ 1 and Ex. A thereto, STATE'S EX. VOL. II, **614-21.** (SF 468) (UNDISPUTED).

224. **Figure 12,**⁷² below, is an excerpt from the auction details section of the actual auction viewed by Mr. Stein:

⁷⁰ Defendants admit Fact 219 (SF 281) in part and state "It is UNDISPUTED what Mr. Streiff felt, but it is DISPUTED that Consumer Depot did not disclose that the cartridges could have been defective. *See* DEF. RESP. TO SF 281. Mr. Streiff makes no reference to 'could have been defective,' but state that such defects should have 'clearly' been disclosed. Since Consumer Depot disputes something that was not stated by the affiant, such statement becomes a non issue.

⁷¹ Defendants admit Fact 220 (SF 282) in part and state "It is UNDISPUTED what Mr. Streiff felt, but it is DISPUTED that those feelings were reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO SF 282. There is no indication in Fact 220 (SF 282) that Mr. Streiff's belief was reasonable or arose out of the conduct of Consumer Depot. Moreover, such inquiries involve legal conclusions that are not relevant to the issues presently before the Court.

⁷² Formerly **Figure 15** in State's Mem of Facts.



Figure 12

See Stein Aff., at Ex. A, STATE'S EX. VOL. II, 618. (SF 469) (UNDISPUTED).

225. In particular, Consumer Depot's eBay auction advertisement for the Canon Color Photo Printer stated:

CANON IP3000 PIXMA COLOR PHOTO PRINTER
SAVE BIG
 NO MANUAL; NO POWER ADAPTER; NO PRINTER CABLE -
 They say a picture is worth a thousand word? We don't
 have time to type that much. Look at this picture !!
 Another great auction item. Don't let this one get away.
 What you see in the photo is what is included.

Id. (SF 470) (UNDISPUTED IN PART).⁷³

⁷³ Defendants admit Fact 225 (SF 470) in part and state "It is UNDISPUTED that the above was part of the auction language at issue, but it is DISPUTED that it comprised all of it." See DEF. RESP. TO SF 470. There is no assertion by the State that this advertising statement comprises all of defendants' auction language, and the State has not made such an allegation in

226. Mr. Stein already had one such printer at home, but wanted to buy a second printer for a good price, so the fact that the **Canon IP3000 Pixma Color Photo Printer** did not come with a manual, power adapter or printer cable was not a big deal because he already had these items from his other printer. *See* Stein Aff. ¶ 3, STATE'S EX. VOL. II, **614**. (SF 472) **(UNDISPUTED)**.

227. When Mr. Stein's **Canon IP3000 Pixma Color Photo Printer** arrived from Consumer Depot, it was not as advertised and had been cannibalized; parts were missing, including the cartridges and print head cover, rendering the printer useless. *See* Stein Aff., ¶ 5, STATE'S EX. VOL. II, **615** (SF 476) **(UNDISPUTED)**.

228. At the time he wrote his affidavit, Mr. Stein was eighty-three (83) years old, retired and living on a fixed income. *Id.* ¶ 7. (SF 478) **(UNDISPUTED)**.

229. Because it would cost Mr. Stein another \$20.00 to ship the item back to Consumer Depot with no guarantee of a refund, Mr. Stein decided not to risk returning the printer and losing more money because it wasn't worth the cost. *Id.* (SF 479) **(UNDISPUTED IN PART)**.⁷⁴

230. Mr. Stein also left negative feedback against Consumer Depot on eBay and Consumer Depot promptly . . . left negative feedback on eBay against him. *Id.* ¶ 8. (SF 480)

this case.

⁷⁴ Defendants admit Fact 229 (SF 479) in part and state "It is **UNDISPUTED** for purposes of this Motion that Mr. Stein acted the way he did, but it is **DISPUTED** that he would not have received a refund if he had followed proper procedures." *See* DEF. RESP. TO SF 479. There is no indication in SF 479 that Mr. Stein would have not received a refund if he spent another \$20 to ship the item back to Consumer Depot, but merely that he did not want to take such a risk.

(UNDISPUTED IN PART).⁷⁵

231. At the time of his Affidavit, Mr. Stein made over forty-five purchases on eBay, and up until Consumer Depot's retaliatory feedback, had enjoyed a 100% positive feedback rating on eBay. *Id.* (SF 481) (UNDISPUTED).

232. Mr. Stein felt he had been cheated and misled by Martin Fike and Consumer Depot. *Id.* ¶ 9. (SF 483) (UNDISPUTED IN PART).⁷⁶

(23) Consumer Gevon Ware

233. On May 28, 2005, consumer Gevon Ware visited Consumer Depot's retail store in Nashville and saw a 17" MGA Flat Panel Monitor for sale that was plugged in and "on." *See* Ware Aff. at ¶¶ 1-2, STATE'S EX. VOL. I, 150-54 (SF 327) (UNDISPUTED).

234. At that time. Ms. Ware noticed there was a tiny chip in the upper portion of the monitor which did not effect the picture and that the Monitor appeared sound. *Id.* (SF 328) (UNDISPUTED).

235. Ms. Ware asked a Consumer Depot salesman about the Monitor, and he assured her it was fine and had no problems. *Id.* (SF 328) (UNDISPUTED).

236. Ms. Ware also saw a number of new, boxed printers for sale, including a

⁷⁵ Defendants admit Fact 230 (SF 480) in part and state "It is UNDISPUTED that both parties left negative feedback for each other, but it is DISPUTED that Consumer Depot 'retaliated.'" *See* DEF. RESP. TO SF 480. The reference to retaliation has therefore been omitted from Fact 230.

⁷⁶ Defendants admit Fact 232 (SF 483) in part and state "It is UNDISPUTED how Mr. Streiff felt, but it is DISPUTED that his feelings were reasonable or were induced by Martin Fike and Consumer Depot." *See* DEF. RESP. SF 483. There is no indication in SF 483 that Mr. Stein's feelings were reasonable or induced by Consumer Depot and Martin Fike, and such inquiries are involve legal conclusions that are not relevant to the issues presently before the Court.

Id. ¶ 5 (emphasis added). (SF 258) (UNDISPUTED).

252. Mr. Weiss only received the store credit after he shipped the nonfunctional PDA back to Consumer Depot at his expense. *Id.* ¶ 5. (SF 259) (UNDISPUTED).

(25) Consumer Marvin Weissman

253. On June 7, 2004, consumer Marvin Weissman visited the eBay internet auction site and saw that Consumer Depot was selling a **Casio FX-7400G Plus Graphing Calculator** under its "bargaindepot04" user id as item number 3819923171. *See* Weissman Aff., ¶ 1 and Ex. 1 thereto, STATE EX. VOL. I, 161-67 (SF 223) (UNDISPUTED).

254. On June 7, 2004, consumer Marvin Weissman won defendants' eBay auction for a Casio FX-7400G Plus Graphing Calculator. *See* Weissman Aff., ¶¶ 1-5, STATE'S EX. VOL. I, 161-67 (SF 349) (UNDISPUTED).

255. Mr. Weissman observed that Consumer Depot's eBay advertisement made the following representation regarding the a **Casio FX-7400G Plus Graphing Calculator**:

This item came in on a huge liquidation from a MAJOR RETAILER. Inspected by our technicians to insure [sic] TOP QUALITY. If the original retail box did not meet our standards - the item was repackaged for shipping. The item is the one you want if you are looking to SAVE BIG!! (May be missing software/manual or accessories - check manufacturers website for available drivers or software downloads) CASIO FX-7400G Plus Graphing Calculator Over 400 Functions.

Id. at ¶ 2 and Exhibit 1 at p. 2 (SF 224) (UNDISPUTED).

256. Consumer Depot's eBay advertisement stated the Calculator "**came in on a huge liquidation from a MAJOR RETAILER,**" had been "***Inspected by our technicians to insure [sic] TOP QUALITY***" and "**This item is the one you want if you are looking to**

Hewlett-Packard PSC 2410 All-in-One Photosmart Printer for sale for \$99.99. *Id.* at ¶ 3 (SF 329) (UNDISPUTED).

237. She decided to buy both the Monitor and the Printer. *Id.* at ¶¶ 2-3 (SF 330) (UNDISPUTED).

238. When Ms. Ware got home and turned her Monitor on, it projected a bright pink line down the left side of the monitor, and the tiny chip in the center of the screen was now very bright, because her computer wallpaper was blue. *Id.* at ¶ 4 (SF 331) (UNDISPUTED).

239. Intending to stop payment on her check, Ms. Ware left the store without the Monitor and without a refund. *Id.* at ¶ 7 (SF 337) (UNDISPUTED).

240. Ms. Ware immediately went back to Consumer Depot to complain. *Id.* at ¶ 9 (SF 339) (UNDISPUTED).

241. The printer worked initially, then stopped. *Id.* (SF 343) (UNDISPUTED).

242. Ms. Ware stopped payment on her checks. *Id.* at ¶ 11 (SF 345) (UNDISPUTED).

243. She gave her Consumer Depot paperwork to Telecheck and they removed the derogatory report against her from their database. *Id.* at ¶ 13 (SF 347) (UNDISPUTED).

244. In her Affidavit, Ms. Ware states she feels she has been “misled, deceived, humiliated and embarrassed by Consumer Depot” and still gets “very upset when I think of

what I went through with Consumer Depot. *Id.* at ¶ 14. (SF 348) (UNDISPUTED IN PART).⁷⁷

(23) **Consumer Manuel Weiss**

245. On October 24, 2002, consumer Manuel Weiss purchased a **Palm i705 PDA** (personal digital assistant) from Consumer Depot's website at www.consumerdepot.com. Weiss Aff., ¶ 1 and Ex. 1-3 thereto, **155-60** (SF 247) (UNDISPUTED).

246. Consumer Depot advertised and sold Mr. Weiss' **Palm i705 PDA** as "Consumer Depot Refurbished" and "Open Box." *Id.* (SF 248) (UNDISPUTED).

247. Mr. Weiss saw that on its website, Consumer Depot stated that "**Consumer Depot Refurbished**" meant:

Consumer Depot Refurbished "Depot Refurbished" products are in complete working order and thoroughly tested by competent technicians. Products have a limited vendor warranty, if any, or carry a Consumer Depot warranty.

Weiss Aff., ¶ 1 and Ex. 3 thereto (emphasis added), **155-60** (SF 249) (UNDISPUTED).

248. Mr. Weiss paid a total of \$245.81 for the **Palm i705 PDA**. *Id.* (SF 251) (UNDISPUTED).

249. When Mr. Weiss' **Palm i705 PDA** arrived a few days later, it did not work; it would not turn on and would not charge. *Id.* ¶ 2 (SF 252) (UNDISPUTED).

250. Mr. Weiss . . . requested a refund, but Consumer Depot refused to give him a refund. *Id.* ¶ 4 (SF 254) (UNDISPUTED).

251. The only option Consumer Depot gave Mr. Weiss was a "store credit" of \$245.81.

⁷⁷ Defendants admit Fact 244 (SF 348) in part and state "It is UNDISPUTED as to Ms. Ware's feelings, but it is DISPUTED that they were caused by the conduct of Consumer Depot." See DEF. RESP. SF 348. There is no statement in SF 348 that Ms. Ware's feelings were caused by Consumer Depot. Further, such inquiry involves a legal conclusion that is not relevant to the issues presently before the Court.

SAVE BIG!!" *Id.* at ¶¶ 2-3. (emphasis in original). *And see* Ex. A thereto (Copy of Consumer Depot's auction pages for this item from the eBay website). *Id.*, STATE'S EX. VOL. I, 161-67 (SF 350) (**UNDISPUTED**).⁷⁸

257. As a result of Consumer Depot's above representations, Mr. Weissman believed Consumer Depot was selling a brand new, inspected and fully functional product and that he would indeed "SAVE BIG" as Consumer Depot promised. *Id.* at ¶ 4. (SF 226) (**UNDISPUTED IN PART**).⁷⁹

258. Mr. Weissman proceeded to bid on Consumer Depot's auction and submitted the winning bid for the **Casio FX-7400G Plus Graphing Calculator**. *Id.* at ¶ 5 (SF 227) (**UNDISPUTED**).

259. When Mr. Weissman received his Calculator from Consumer Depot, it arrived with a tag attached to it which said "**DEFECTIVE**" and the calculator did not work. *Id.* at ¶ 6 (SF 228 and 353) (**UNDISPUTED**).

260. The calculator was totally useless to Mr. Weissman. *Id.* (SF 229) (**UNDISPUTED**).

⁷⁸ Defendants admit Fact 256 (SF 350) in part and state "It is **UNDISPUTED** for purposes of this Motion that the above language appeared in the auction, but it is **DISPUTED** that such was the only language." *See* DEF. RESP. SF 350. There is no indication in SF 350 that such was the only language in Mr. Weissman's auction, and no such claim has been made by the state in this case. Moreover, the State has included Mr. Weissman's complete auction for this transaction as Ex. A to Mr. Weissman's affidavit.

⁷⁹ Defendants admit Fact 257 (SF 226) in part and state "It is **UNDISPUTED** for purposes of this Motion as to what Mr. Weissman believed, but **DISPUTED** that such was a reasonable belief, given the auction language at Exhibit Z to Martin Fike Affidavit." *See* DEF. RESP. TO SF 226. Whether or not Mr. Weissman's feelings were "reasonable" is not relevant to the present inquiry and constitutes a legal conclusion. Moreover, there is no reference to the reasonableness of Mr. Weissman's feelings in this fact.

261. Mr. Weissman later learned that Consumer Depot wanted him to pay the return shipping cost. *Id.* at ¶ 7 (SF 231) (UNDISPUTED).

262. Mr. Weissman felt it was deceptive for Consumer Depot to require him to pay return shipping on a defective item because Consumer Depot's auction advertising said nothing about having to pay return shipping on a defective item. *Id.* at ¶ 7 and see Ex. 1 thereto (SF 232) (UNDISPUTED in Part).⁸⁰

(25) Consumer Mary Wilkes

263. On January 17, 2006, consumer Mary Wilkes visited the eBay internet site and saw that Consumer Depot, through its "returndealz04" eBay user ID, was selling the movie "Atlantis" as a *NEW SEALED* DVD as item number 6469815528, and the movie "Once Upon a Time in Mexico," also as a "*NEW SEALED*" DVD. See Wilkes Aff. ¶ 1-2 and Exs. A-B thereto, STATE'S EX. VOL. I, 168-89 (SF 82) (UNDISPUTED).

264. Consumer Depot's eBay auction for the Atlantis movie stated the following:

ATLANTIS DVD MOVIE *NEW SEALED*
This [movie/DVD] is brand new; the Paper cover got wet. - Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The photo above is the item you are bidding on.

- Have questions? Click here!
- Return defective product (Get RMA#)

Id. at ¶ 2 and Ex. A thereto, (SF 83 and 591) (UNDISPUTED).

⁸⁰ Defendants admit Fact 262 (SF 232) in part and state "It is UNDISPUTED for purposes of this Motion as to what Mr. Weissman felt, but it is DISPUTED that such was a reasonable belief, given the auction language of Exhibit Z to Martin Fike Affidavit." See DEF. RESP. TO SF 232. Whether or not Mr. Weissman's feelings were 'reasonable' is not relevant to the present inquiry and constitutes a legal conclusion. Moreover, there is no reference to the reasonableness of Mr. Weissman's feelings in this fact.

265. Similarly, Consumer Depot's eBay auction for the **Once Upon a Time in Mexico** movie stated the following:

ONE [sic] UPON A TIME IN MEXICO DVD MOVIE *NEW SEALED*

This [movie/DVD] is brand new; the paper cover got wet. - Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The photo above is the item you are bidding on.

- Have questions? Click here!
- Return defective product (Get RMA#)

Id. at ¶ 2 and Ex. B thereto (SF 84) (UNDISPUTED).

266. Consumer Mary Wilkes won defendants' eBay auction for two movie DVDs. *See Wilkes Aff.*, ¶¶ 1-4 (SF 590) (UNDISPUTED).

267. On January 17, 2006, Mrs. Wilkes submitted the winning bids for Consumer Depot's above **Atlantis** and **Once Upon a Time in Mexico** DVDs. [She] spent a total of \$6.00 for both items. *Id.* (SF 89) (UNDISPUTED).

268. When Mrs. Wilkes received her DVDs from Consumer Depot, both DVDs were in terrible condition. *Id.* at ¶ 5 (SF 90 and 592) (UNDISPUTED IN PART).⁸¹

269. [W]hile both DVDs were sealed, they were "soggy, mildewed, and had a strong stench that could be smelled even before each was opened." *Id.* (SF 91, 593 and 594) (UNDISPUTED).

270. The cardboard cover on the **Once Upon a time in Mexico** DVD "had black

⁸¹ Defendants dispute the second half of Fact 268 (SF 90 and 592) and state: "It is DISPUTED that the DVDs were not usable." *See DEF. RESP. TO SF 90 and 592.* Reference to Mrs. Wilkes' statement that the DVDs were not usable has therefore been omitted from this fact.

mold actually growing on it.” *Id.* at ¶ 5 (SF 92 and 594) (**UNDISPUTED**).

271. Mrs. Wilkes promptly went to Consumer Depot’s eBay site to return these DVDs and clicked the **“Return defective product”** link at the end of the auction details as directed. *Id.* at ¶ 6 (SF 94, 596 and 597) (**UNDISPUTED**).

272. When Mrs. Wilkes entered the first item number as she was directed to do by Consumer Depot, Consumer Depot displayed a message which said:

**AUCTION # 6469815528 was ‘SOLD AS IS’ and is NOT eligible for RMA/Return.
Please click here to refer to your AUCTION for more information.**

Id. and Ex. C thereto (SF 95 and 597) (**UNDISPUTED**).

273. Mrs. Wilkes went back to the auction page and saw that in a further section of the website, Consumer Depot stated in a separate “Returns” section that “All Sales Final - Sold As Is - No Returns.” *Id.* at ¶ 6 and Ex. A and B thereto (SF 96 and 598) (**UNDISPUTED**).

274. Mrs. Wilkes thought it was very misleading for Consumer Depot to place a link for returning defective products by each auction description on the one hand, and then to place separate “As-Is” and “No returns” messages in separate portions of the auction pages next to photographs of unrelated auction items. *Id.* (SF 97, 503 and 603) (**ADMITTED UNDISPUTED IN PART**).⁸²

275. Mrs. Wilkes also made attempts to communicate with Consumer depot, but to

⁸² Defendants admit Fact 274 (SF 97, 503 and 603) in part and state: “UNDISPUTED for purposes of ruling on this Motion for Summary Judgment as to Mrs. Wilkes’ feelings, but it is disputed that she was misled. *See* DEF. RESP. TO SF 97, 503 and 603. Defendants’ objection is noted, but their objection relates to a legal conclusion which is not made in this fact.

no avail. *Id.* at ¶ 9 (SF 602) (**UNDISPUTED**).

276. Mrs. Wilkes also e-mailed Consumer Depot directly on January 13, 2006 through the eBay site as well as through returndealz04@auctionlogistix.com after she discovered that the items were unreturnable. *Id.* at ¶ 9 (SF 98) (**UNDISPUTED**).

277. Mrs. Wilkes received two replies from Consumer Depot on January 16, 2006 and attempted to communicate with Consumer Depot through www.auctionlogistix.com/clients/support/contact.asp as well. *Id.* (SF 99) (**UNDISPUTED**).

278. Mrs. Wilkes also went to the RMA/Return Issues, then again attempted to get RMA return number, but was again told the items were nonreturnable. *Id.* (SF 100) (**UNDISPUTED**).

279. Mrs. Wilkes was very upset about Consumer Depot's sales practices and decided to leave negative feedback about Consumer Depot on eBay, but as soon as she did, Consumer Depot left negative feedback against her. *Id.* ¶ 7. (SF 101, 599 and 600) (**UNDISPUTED IN PART**).⁸³

280. Mrs. Wilkes had paid very promptly, a short time after each auction ended and felt Consumer Depot had no reason to leave negative feedback against her as she only told the truth about the condition of consumer Depot's goods. *Id.* And see eBay feedback pages at p. 2, STATE'S EX. VOL. I, 170 and 183-87 (SF 102) (**ADMITTED UNDISPUTED IN PART**).⁸⁴

⁸³ Defendants admit Fact 279 (SF 101) in part and state: **UNDISPUTED** as to Mrs. Wilkes' feelings, but it is **DISPUTED** that Consumer Depot's conduct was retaliatory. See Martin Fike Aff., ¶¶ 16 and 67." See DEF. RESP. TO SF 101. Mrs. Wilkes' reference to Consumer Depot's retaliation has therefore been omitted from Fact 279.

⁸⁴ Defendants admit Fact 280 (SF 102) in part and state: "IT IS **UNDISPUTED** for purposes of ruling on this Motion for Summary Judgment that Ms. Wilkes paid a short time

281. Mrs. Wilkes' eBay Member Profile shows she had a 100% positive feedback rating with eBay for [her] 81 eBay transactions, but as a result of Consumer Depot's negative feedback, her [feedback rating] dropped and so [did her] 100% positive reputation. *Id.* at ¶ 7 and Ex. E at 1 (SF 103) (UNDISPUTED).

282. Mrs. Wilkes had previously never given a neutral or negative feedback to anyone until she had to give the above negative feedback to **returndealz04**. *Id.* (SF 104) (UNDISPUTED).

283. Mrs. Wilkes has since reviewed the eBay website and has seen that there are many other consumers who have had equally bad experiences with Consumer Depot. *Id.* at ¶ 8 (SF 105) (UNDISPUTED).

284. Mrs. Wilkes also observed that each time one of those consumers left negative or neutral feedback left against Consumer Depot, Consumer Depot left negative feedback against those consumers. *Id.* (UNDISPUTED IN PART).⁸⁵

285. Mrs. Wilkes produced and authenticated the actual DVDs received from Consumer Depot, which still maintain the malodorous stench she describes, along with the visible black mold. Both DVDs have been refrigerated since receipt, and will be available for inspection during the hearing on this matter. *Id.* at ¶ 5 (SF 595) (UNDISPUTED).

after each auction, and UNDISPUTED as to her feelings, but it is DISPUTED that her feelings were reasonable or arose out of the conduct of Consumer Depot." *See* DEF. RESP. TO SF 102. No reference to the "reasonableness" of Ms. Wilkes' feelings is included in the statement.

⁸⁵ Defendants admit Fact 284 (SF 106) and state: "It is UNDISPUTED for purposes of this Motion what Mrs. Wilkes might have observed, but DISPUTED that Consumer Depot's conduct was retaliatory." *See* DEF. RESP. TO SF 106. Mrs. Wilkes' reference to Consumer Depot's retaliation has therefore been omitted from this fact.

III. ADDITIONAL CONSUMER DEPOT ADMISSIONS REGARDING DEFENDANTS' UNFAIR OR DECEPTIVE BUSINESS CONDUCT

A. Software Is Never Returnable (No Matter What)

286. According to defendant Fike, *software is never returnable, even if a return option is mentioned in an advertisement:*

Q: [W]hen you knew it was software, why did you even say, 'Not happy, send it back within seven days'?

A: "That's a stock insert that goes with returndealz. So that was not a decision that was made specifically. It's just a statement that all products with a seven-day return can be sent back."

See Fike Dep. at p. 163-64, STATE'S EX. VOL. II, 742-43. (SF 465) (emphasis added)

(UNDISPUTED).

B. Representing Items Are New is "Just Stock Language"

287. According to defendant Fike, stating that items are brand new is just part of Consumer Depot's stock language:

Q: "Is it stock to say this item is brand new?"

A: "Yes."

Id. p. 165 (SF 466) **(UNDISPUTED).**

C. "No Returns" Policy Applies Even If Items Are Misrepresented

288. According to defendant Fike, *Consumer Depot enforces "As-Is" disclaimers apply even if items were sold not as represented:*

Q: "Would your no-return policy apply to items that were sold that weren't as represented?"

A: "There are no returns on software."

Id. (SF 467) **(UNDISPUTED).**

289. Defendant Carol Fike testified that in Consumer Depot's retail store, as-is means as-is, no matter what. (SF 554) (UNDISPUTED).

290. Consumer Depot has testified that it thinks that it can use "As Is" as a way to disclaim a number of its responsibilities, including warranties. *See* Response to Request for Admission No. 36, STATE'S EX. VOL. II, **821**. (SF 447) (UNDISPUTED).

D. Consumer Depot Has Admitted and Does Not Dispute Any of the Advertising Representations Submitted by the State

291. Consumer Depot uses a number of different contract terms and conditions displayed in its eBay auctions, on its web site and in its store, as seen in the various contracts, terms and conditions and eBay auctions which set forth the same in **1-823**. (SF 484) (UNDISPUTED).

292. The contract terms and conditions set forth in **1 - 823** are true and correct terms and conditions used by Consumer Depot in commerce. [STATE'S EX. VOL. I AND II] (SF 485) (UNDISPUTED).

E. Defendants Do Not Always Disclose "Restocking Fees"

293. Defendant Fike testified that he was not sure at what point in the sale transaction Consumer Depot disclosed its restocking fee.

Q: At what point in the eBay transaction is the restocking fee disclosed to the consumers?

A: I'm not certain. It's on some of the auctions. I'm not sure if it's on every one.

See Fike Dep., pp. 200-01, STATE'S EX. VOL. II, **752**. (SF 487, 494) (UNDISPUTED).

294. During his deposition, defendant Fike stated that in most cases, consumers

who return defective items get refunds for their shipping costs. *Id.* at 161 (SF 488)

(UNDISPUTED).

295. Defendant Carol Fike testified that with a website sale, if a consumer made a return because they didn't want the item, a non-defective return, there would be a restocking fee only for a higher value item such as a \$500, \$600 notebook computer. *See* Carol Fike Dep., STATE'S EX. VOL. II, p. 58, **879** (SF 521) **(UNDISPUTED).**

296. Defendant Carol Fike testified that on any smaller items, [Consumer Depot] just we just refund it without a restock fee because it's going to turn into a credit card hassle." *Id.* (SF 522) **(UNDISPUTED).**

F. Consumer Depot's Website Is Designed to Prevent Some Consumers From Obtaining RMAs ("Return Merchandise Authorizations")

297. Some consumers attempted to get RMAs, but reported that Consumer Depot's website was designed to prevent them from doing so. *See* STATE'S EX. VOL. I, **168-71, 222** and **236.** (SF 499) **(UNDISPUTED IN PART).**⁸⁶

298. But when they received damaged products and clicked the "Return" link, Consumer Depot displayed a message which said: **"SOLD AS IS' and is NOT eligible for RMA/Return."** STATE'S EX. VOL. I **99, 169** (SF 502) **(UNDISPUTED).**

299. Defendant Carol Fike testified that consumers could still email Consumer Depot via its webform or open dispute through eBay and get RMA that way. *See* Carol Fike Dep., STATE'S EX. VOL. II, p. 65, **880** (SF 544) **(UNDISPUTED).**

300. In that case, RMA would have to be issued manually, but that is not explained

⁸⁶ Defendants do not dispute this fact except as to the State's citation to the BBB records.

anywhere on the auction site. *Id.* (SF 545) (UNDISPUTED).

G. Consumer Depot Does Not List Its Telephone Number

301. Consumer Depot has admitted that it lists no phone number for consumers to contact it before bidding on its eBay auctions, nor concerning their eBay auctions. *See* Response to Request for Admissions Nos. 28 and 29, STATE'S EX. VOL. II, 819. (SF 514) (Undisputed).

302. Consumer who place telephone calls in advance of bidding on an item do not receive return calls from Consumer Depot. *See* Carol Fike Dep. at p. 42 STATE'S EX. VOL. II, 917 (SF 515) (UNDISPUTED).

303. Defendant Carol Fike has testified that Consumer Depot does not get many telephone complaints. *Id.* at 41-42, 916-17 (SF 517 and 518) (UNDISPUTED).

304. Defendant Carol Fike also testified that Consumer Depot does not receive those types of telephone calls. *Id.* (SF 518) (UNDISPUTED).

H. Consumer Depot Uses Auto-Responders to Respond to emails

305. Consumer Depot uses an automated computer system to respond to consumer complaints and does not accept complaints by telephone. *See* Response to Request for Admissions Nos. 18, STATE'S EX. VOL. II, 817 (SF 516) (UNDISPUTED).

306. Defendant Carol Fike testified that if a consumer sent an email about a problem, or if there was some communication, "I'm sure there would be some consideration." *See* Carol Fike Dep., STATE'S EX. VOL. II, p. 57 (SF 520) (UNDISPUTED).

I. Refunds Are "Probably" Given for Misrepresented Products

307. Defendant Carol Fike has testified that if CD had misrepresented a product,

“we would probably refund the customer that.” *Id.* p. 55, **878** (SF 519) (**UNDISPUTED**).

308. Defendant Carol Fike testified she would think that with 99.9 percent of their eBay auctions, consumers get full refunds of their purchase price and shipping. *Id.* at 59, **879** (SF 523) (**UNDISPUTED**).

J. Credit Cards Chargebacks Cost Consumer Depot \$35 each

309. Defendant Carol Fike testified that “It costs [Consumer Depot] dearly to process a return and give a full refund.” *Id.* at 69-70 and Ex. 4 thereto, **881-82** (SF 549) (**UNDISPUTED**).

310. Defendant Carol Fike testified that a “credit card chargeback costs my company \$35 dollars to process from the credit card company, and I want to avoid those.” *Id.* at 60, **879** (SF 524) (**UNDISPUTED**).

K. Consumer Depot’s 7 Day Return Period Is Allegedly 10 Days - 2 Weeks

311. Defendant Carol Fike testified that even though Consumer Depot’s eBay auctions say there is a seven day return period, consumers have “ten days, two weeks, at least; at least to obtain a number [RMA] to return the product.” *Id.* (SF 525) (**UNDISPUTED**).

312. In a letter written to Joyce Hughey at the Tennessee Division of Consumer Affairs, Consumer Depot represented that a consumer had 14 days to get an RMA from the date the consumer receives the product.” *Id.* at 78, **884** (SF 532) (**UNDISPUTED**).

313. Defendant Carol Fike testified that the two weeks period is just for purposes of getting a return authorization number. *Id.* at 60 - 61, **879** (SF 526) (**UNDISPUTED**).

314. Defendant Carol Fike testified that this two week added time period for getting an RMA has always been the case w/eBay sales. *Id.* at 61, **879** (SF 527) (**UNDISPUTED**).

315. Defendant Carol Fike testified that consumers have up to two weeks to get an RMA number from Consumer Depot for purposes of returning an eBay purchase. *Id.* (SF 528) (UNDISPUTED).

316. Defendant Carol Fike testified that the RMA process is automatic, which means the RMA is issued automatically. *Id.* at 79-80, **884** (SF 551) (UNDISPUTED).

317. The computer does not know exactly when any particular consumer receives a product. *Id.* at 80, **884** (SF 552) (UNDISPUTED).

318. Defendant Carol Fike testified that in cases where the time allowed to get an RMA is 14 days from the receipt of the product, it's really more like 21 or more days from the date of shipping. *Id.* (SF 553) (UNDISPUTED).

319. Defendant Carol Fike testified that after getting an RMA, a consumer has at least another 10 days to send the item back to Consumer Depot. *Id.* at 62, **880** (SF 529) (UNDISPUTED).

320. Defendant Carol Fike testified that Consumer Depot is not strict about the return time at all. *Id.* (SF 531) (UNDISPUTED).

321. Defendant Carol Fike testified that if a consumer waits past 14 days to get an RMA, then its too late. *Id.* at 64, **880** (SF 532) (UNDISPUTED).

K. Consumer Depot Says It Does Not Make Many Mistakes

322. Defendant Carol Fike testified that Consumer Depot does not make that many mistakes. *Id.* at 65, **880** (SF 546) (UNDISPUTED).

323. During the course of the Attorney General's investigation, when Consumer Depot was asked about 87 different consumer complaints that had been reported to date,

Consumer Depot determined that only 2 of those complaints had any merit. (SF 548)

(UNDISPUTED).

L. Consumer Depot Says It Refunds Shipping Both if it Made a Mistake

324. Defendant Carol Fike testified that if a consumer with its eBay auctions, Consumer Depot refunds shipping costs both ways if it made the mistake. *Id.* at 66, **881** (SF 547) (UNDISPUTED).

M. Consumer Depot's Business Volume and Sales

325. To date, Consumer Depot has sold over 600,000 items through eBay auctions. See Responses to Requests for Admissions 6 - 17, *See* STATE'S EX. VOL. II, **813-17** (SF 609) (UNDISPUTED).

326. From 1999 to 2004, Consumer Depot's sales totaled over \$36 million. *See* Carol Fike Dep. at 68, STATE'S EX. VOL. II, **881** (SF 610) (UNDISPUTED).

327. In 2004, Consumer Depot shipped almost 60,000 internet and auction orders. *Id.* at 69, **881** (SF 611) (UNDISPUTED).

CONCLUSIONS OF LAW

I. STANDARDS FOR SUMMARY JUDGMENT

1. Under Tennessee law, “[t]he moving party is entitled to summary judgment only if the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Martin v. Norfolk*, 271 S.W.3d 76, 83 (Tenn. 2008).
2. “The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.*, *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).
3. “If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist.” *Martin*, 271 S.W.3d at 84; *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).
4. “A disputed fact presents a genuine issue if “a reasonable jury could legitimately resolve that fact in favor of one side or the other.” *Id.*
5. “Any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party.” *Martin*, 271 S.W.3d at 84; *Byrd*, 847 S.W.2d at 215.
6. As the moving party, the State’s burden is to “present facts which, if undisputed, demonstrate its entitlement to judgment as a matter of law.” *Summers v. Cherokee Children & Family Services, Inc.*, 112 S.W.3d 486, 510 (Tenn. Ct. App. 2002).

II. JURISDICTION AND VENUE

7. The jurisdiction of this Court is invoked pursuant to the provisions of Tenn. Code Ann. § 47-18-108. Venue is proper in Davidson County Tenn. Code Ann. § 47-18-108(a)(3), because it is the county where the majority of the unfair and deceptive acts and practices took place, and where defendants engage in, or have engaged in trade or commerce. Davidson County is also the county where all defendants reside.

8. Because the present matter is proceeding pursuant to the State's Amended Complaint with leave of court, and with service and notice to all parties, the ten (10) day notice of proceedings under Tenn. Code Ann. § 47-18-108(a)(2) has been provided. *See* First Amended Complaint, Dkt. 82-83.

III. THE STATE'S ALLEGATIONS

9. In its Amended Complaint, the State alleges that all defendants have engaged in numerous unfair and deceptive business acts and practices in connection with their business activities, and that since 2002, over twenty-one thousand (21,000) consumers have lodged complaints against Defendants with the Tennessee Division of Consumer Affairs, the Better Business Bureau, the Federal Trade Commission, the Internet Fraud Complaint Center and the Tennessee Attorney General's Office, or posted negative feedback against Defendants on eBay. *See* Amended Complaint and Ex. A thereto, DKT. 82-83. *See also* Dec. 22, 2008 Order Granting Partial Summary Judgment, ¶ 10, DKT. 198 *and* STATE'S EX. VOL. II, 824-62.

10. The State alleges that the majority of complaints against Consumer Depot and the other Defendants involve allegations that they fail to deliver products as advertised or

promoted. *See* Amended Complaint, DKT. 82-83. *See also* Dec. 22, 2008 Order Granting Partial Summary Judgment, *Id.* at ¶ 11 and STATE'S EX. VOL. II, 824-63.

11. The State alleges that consumers often receive broken, defective or empty products, or nothing at all, and that the Defendants regularly refuse to remedy or correct such problems, act in bad faith, refuse to honor their representations, contradict their representations and/or refuse to issue refunds. *Id.*

12. The State's Amended Complaint is in two counts. *See* Amended Complaint, DKT. 82-83. Count I of the Amended Complaint charges defendants with engaging in unfair and deceptive acts and practices in violation of Tenn. Code Ann. § 47-18-104(a) as follows:

53. At all times relevant hereto, the Fikes, Hinds, Auction Logistix and/or Consumer Depot have individually and collectively participated in the unlawful conduct alleged herein, and have served as agents of each other and/or have aided and abetted each other by committing the aforesaid acts and practices that are unfair or deceptive, in violation of Tenn. Code Ann. § 47-18-104(a).

54. By engaging in the aforesaid conduct, the Fikes, Hinds, Auction Logistix and/or Consumer Depot have violated the Tennessee Consumer Protection Act by committing acts and practices that are unfair or deceptive, in violation of Tenn. Code Ann. § 47-18-104(a).

13. Count II of the State's Amended Complaint is brought under the second, "laundry list" section of the TCPA and charges defendants with violating ten of the forty-four sections of Tenn. Code Ann, including §§ 47-18-104(b)(2), (3), (5)-(7), (9), (12), (19), (21), and (27), as well as Tenn. Code Ann. § 47-18-113, as follows:

56. At all times relevant hereto, the Fikes, Hinds, Auction Logistix and/or Consumer Depot have individually and collectively participated in the unlawful conduct alleged herein, and have served as agents of each other and/or have aided and abetted each other by committing the aforesaid acts and practices that are unfair or deceptive, in violation of Tenn. Code Ann. § 47-18-

104(b).

57. By engaging in the aforesaid conduct, Fike and Consumer Depot have violated the Tennessee Consumer Protection Act by committing acts and practices that are *per se* deceptive, in violation of Tenn. Code Ann. § 47-18-104(b), as follows:

(A) Advertising, directly and by implication, that a particular product is offered for sale, but delivering a different product, in violation of Tenn. Code Ann. § 47-18-104(b)(27);

(B). Advertising, directly and by implication, that items are being sold as "new," but delivering items that are refurbished, used or damaged, in violation of Tenn. Code Ann. § 47-18-104(b)(6) and (b)(27);

(C). Advertising, directly and by implication, that products are "tested," "inspected," or otherwise checked by trained personnel, but delivering products that are broken, defective or incomplete, in violation of Tenn. Code Ann. § 47-18-104(b)(2), (b)(5), (b)(7), (b)(21) and (b)(27);

(D). Advertising, directly and by implication, that merchandise was functional, but delivering merchandise that Defendants knew, or should have known was defective; in violation of Tenn. Code Ann. in violation of Tenn. Code Ann. § 47-18-104(b)(2), (b)(3), (b)(5), (b)(7), (b)(9), (b)(21) and (b)(27);

(E). Advertising, directly and by implication, that products were in good cosmetic shape, but delivering items that were broken, scratched, dirty, or that Defendants knew, or should have known, were empty; in violation of Tenn. Code Ann. § 47-18-104(b)(5), (b)(7), (b)(21) and (b)(27);

(F). Advertising, directly and by implication, that products "work great," but delivering items that do not work or do not function properly, in violation of Tenn. Code Ann. § 47-18-104(b)(5), (b)(7), (b)(21) and (b)(27);

(G). Advertising, directly or by implication, that certain components or hardware was included with an item, but delivering those items without the advertised components or hardware, in violation of Tenn. Code Ann. § 47-18-104(b)(5), (b)(7), (b)(21) and (b)(27);

(H). Advertising or otherwise representing that products are

covered by guarantees or manufacturer's warranties, when, in fact, they are not, in violation of Tenn. Code Ann. § 47-18-104(b)(12), (b)(19) and (b)(27);

(I). Advertising software without disclosing that the software has already been opened and registered to someone else, and thus, not legally useable, in violation of Tenn. Code Ann. § 47-18-104(b)(5), (b)(7), (b)(12), (b)(21) and (b)(27);

(J). Advertising, directly or by implication, that a fixed cost would be charged for shipping and handling, but charging a higher amount in violation of Tenn. Code Ann. § 47-18-104(b)(27);

(K) Advertising terms and conditions of sale which are illegal, contrary to law, unfair or deceptive or unconscionable, or otherwise represent that the transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law, in violation of Tenn. Code Ann. § 47-18-104(b)(12), (b)(27) and 47-18-113;

(L) Posting "terms and conditions" of sale on the internet which are designed to deter legitimate consumer complaints in violation of Tenn. Code Ann. § 47-18-104(b)(27);

(M) Obstructing and evading legitimate return attempts and failing to provide meaningful responses and/or customer service for legitimate consumer complaints, questions and returns; in violation of Tenn. Code Ann. § 47-18-104(b)(12) and (b)(27); and

(N) By retaliating against consumers who file complaints against them on eBay, and in particular by posting harmful, negative and/or false feedback on eBay against such consumers, in violation of Tenn. Code Ann. § 47-18-104(b)(27).

14. Defendants deny the State's above allegations and assert twelve affirmative defenses in their Answer to Amended Complaint. *See* Answer, DKT. 104. As already noted, defendants' affirmative defenses were all previously ruled inapplicable as a matter of law. *See* Dec. 22, 2008 Order Granting Partial Summary Judgment, DKT. 198.

15. Discovery in this proceeding has been prolonged and has necessitated the

filing of a number of motions to compel by the State, all of which were granted by the Court. *See, e.g.*, DKT. 58, 98, 106, 123, 136, 144, 148 and 156.

16. On April 8, 2008, the State moved for partial summary judgment on the issue of the inapplicability of defendants' affirmative defenses. *See* DKT. 175-80. The State's motion was briefed and argued and granted on Dec. 22, 2008. *Id.* The Court's rulings in the Dec. 22, 2008 Partial Summary Judgment Order impacts the present decision, because many of the arguments and defenses defendants raise here, were previously considered and rejected by this Court in the Dec. 22, 2008 Partial Summary Judgment Order.

IV. THE TENNESSEE CONSUMER PROTECTION ACT OF 1977

A. History of the TCPA

17. The Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code Ann. § 47-18-101 *et seq.*, is Tennessee's version of a "Little FTC Act." *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005). "Little FTC Acts were so designated because of their similarity to the provision of the Federal Trade Commission Act that outlaws unfair or deceptive trade practices." *Id.*

18. The model for the TCPA was developed by the Federal Trade Commission in conjunction with the Committee on Suggested State Legislation of the Council of State Governments and is patterned after Alternative # 3 of the Unfair Trade Practices and Consumer Protection Law. *See* Council of State Governments, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law - Revision (Vol. XXIX), Clearinghouse No. 31, 035 B, Compendium of Unreported and Out-of-State Decisions, filed herewith. *See also* D. Pridgen, *Consumer Protection and the Law*, § 3:5 (2002).

B. The Two Main Operative Provisions of the TCPA

19. The TCPA has two main operative provisions: Tenn. Code Ann. § 47-18-104(a) and Tenn. Code Ann. § 47-18-104(b). The first section, Tenn. Code Ann. §104(a) provides, in pertinent part:

Unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices

See Tenn. Code Ann. § 47-18-104(a). Count I of the State's Amended Complaint is brought under Tenn. Code Ann. § 47-18-104(a).

20. In turn, the second operative provision of the TCPA, Tenn. Code Ann. § 47-18-104(b), contains a "laundry list" of forty-four prohibited acts and practices, all of which are declared as unlawful acts or practices under the statute, and thus constitute *per se* deceptive acts and practices. The ten provisions enforced by the State through Count II of the Amended Complaint include the following:

(b) Without limiting the scope of subsection (a), the following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part:

* * * * *

(2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services. This subdivision (b)(2) does not prohibit the private labeling of goods and services;

(3) Causing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another. This subdivision (b)(3) does not prohibit the private labeling of goods or services;

* * * * *

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have;

(6) Representing that goods are original or new if they are deteriorated, altered to the point of decreasing the value, reconditioned, reclaimed, used or secondhand;

(7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(9) Advertising goods or services with intent not to sell them as advertised;

(12) Representing that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law;

(19) Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve; provided, that nothing in this subdivision (b)(19) shall be construed to alter the implied warranty of merchantability as defined in § 47-2-314;

(21) Using statements or illustrations in any advertisement which create a false impression of the grade, quality, quantity, make, value, age, size, color, usability or origin of the goods or services offered, or which may otherwise misrepresent the goods or services in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised goods or services to other goods or services;

(27) Engaging in any other act or practice which is deceptive to the consumer or to any other person;

Tenn. Code Ann. §§ 47-18-104(b)(2), (3), (5)-(7), (9), (12), (19), (21), and (27).

21. The conduct identified in Tenn. Code Ann. § 47-18-104(b) is identified as “unfair or deceptive” and thus “declared to be unlawful and in violation of this part”

See Tenn. Code Ann. § 47-18-104(b)(1). The State therefore does not need to prove that the designated conduct is deceptive; the TCPA already declares that such conduct is unlawful. *Id.*

All the State needs to prove is that the defendants engaged in such unlawful conduct.

22. Tenn. Code Ann. § 47-18-113, in turn, provides as follows:

(a) No provision of this part may be limited or waived by contract, agreement, or otherwise, notwithstanding any other provision of law to the contrary; provided, that the provisions of this part shall not alter, amend, or repeal the provisions of the Uniform Commercial Code relative to express or implied warranties or the exclusion or modification of such warranties.

(b) Any provision in any agreement or stipulation, verbal or written, restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act and related acts set forth in this title is void as a matter of public policy. Further, no action of a consumer or other person can alter, amend, obstruct or abolish the right of the attorney general and reporter to proceed to protect the state of Tennessee and consumers or other persons within this state or from other states who are victims of illegal practices of persons located, wholly or in part, in Tennessee's borders.

(c)(1) No other right or benefit conferred on consumers by any other provision of this code may be waived or otherwise varied except as provided for in this section.

(2) Any waiver of a right or benefit described in this subsection must be knowingly and intelligently made.

(3) The competence of the consumer, the consumer's actual knowledge of the rights or benefits being waived, or lack thereof, the manner in which the right or benefit was pointed out to the consumer at the time of the consumer transaction, the nature of the deception or coercion practiced upon the consumer, the nature and extent of the legal advice received by the consumer, and the value of consideration received are relevant to the issue of whether the waiver was knowingly and intelligently made.

(4) If the consumer was not specifically informed of the effect of the waiver and did not specifically waive such consumer's rights or benefits at the time of the consumer transaction, the party claiming waiver shall have the burden of establishing that the waiver was knowingly and intelligently made.

Tenn. Code Ann. § 47-18-113(1)-(4).

C. The TCPA Is Explicitly Remedial

23. The TCPA is explicitly remedial. The TCPA's remedial objectives are set forth in two sections. The first, Tenn. Code Ann. § 47-18-102, provides:

§ 47-18-102. Purposes - The provisions of this part shall be liberally construed to promote the following policies:

(1) To simplify, clarify, and modernize state law governing the protection of the consuming public and to conform these laws with existing consumer protection policies;

(2) To protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;

(3) To encourage and promote the development of fair consumer practices;

(4) To declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state; and

(5) To promote statewide consumer education.

Tenn. Code Ann. § 47-18-102.

24. Tennessee courts construing the TCPA have emphasized its remedial nature. For example, in *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109 (Tenn. Ct. App. 2005), then Judge Koch ruled that “the TCPA is explicitly remedial, and Tennessee courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere.” *Tucker*, 180 S.W.2d at 115. Thus, the TCPA must be “liberally construed to ... protect consumers and legitimate business enterprises from those who engage in deceptive acts or practices.” Tenn. Code Ann. § 47-18-102(2). *See also* *Gaston v. Tennessee Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 821 (Tenn. 2004); *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 627 (Tenn. 2000); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998); *Ganzevoort v. Russell*, 949 S.W.2d 293, 297 (Tenn. 1997); *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992) and *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 305 (Tenn. Ct. App. 1984).

25. The second remedial provision in the TCPA may be found at Tenn. Code Ann. § 47-18-115, which provides as follows:

47-18-115. Construction - This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, shall be construed to effectuate the purposes and intent

Tenn. Code Ann. § 47-18-115. *See also Tucker*, 180 S.W.3d at 114 (citing Tenn. Code Ann. § 47-18-115). *See also Myint*, 970 S.W.2d at 925 and *Morris*, 824 S.W.2d at 540.

26. The remedial nature of the TCPA also manifests through a relatively light burden of proof. Under the TCPA, a plaintiff does not need to prove the traditional elements required in tort or contract cases. Thus, an act or practice can be deceptive even if there is no intent to deceive. *See, e.g., FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 575 (7th Cir. 1989); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).

27. Moreover, “knowledge” is not an element of deception under the TCPA. *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. App. 1992).

28. “Reliance” is not required. *Harvey v. Ford Motor Credit Co.*, No. 03A01-9807-CV-00235, 1999 WL 486894, *2 (Tenn. Ct. App. July 13, 1999).

29. Even a negligent misrepresentation can constitute a violation of the TCPA. *Id.* at 13.

30. Thus, in the case at hand, the State does not need to prove that any consumer was actually misled or deceived in order to prove that a violation of law has occurred. *Tucker*, 180 S.W.3d at 115; *Cf. Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978).

31. The TCPA provides for two different types of action. A private right of action

is available under Tenn. Code Ann. § 47-18-109 and a civil law enforcement action, like the present action, is available under Tenn. Code Ann. §§ 47-18-108.

32. Notably, in considering the remedial nature of the TCPA in the context of a civil law enforcement proceeding, it is important to note that in enacting the TCPA, the General Assembly explicitly stated it intended to promote the policy of “*maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels be had in [Tennessee].*” Tenn. Code Ann. § 47-18-102(4) (emphasis added).

D. The TCPA Must Be Construed Consistent With FTC Law

33. Tenn. Code Ann. § 47-18-115 expressly mandates that the TCPA *shall* be interpreted “consistently with the interpretations given by the Federal Trade Commission and the federal courts pursuant to §5(A)(1) of the Federal Trade Commission Act.” Tenn. Code Ann. § 47-18-115. *See also Tucker*, 180 S.W.3d at 115; *Ganzevoort*, 949 S.W.2d at 298. Thus, the TCPA must be construed consistently with federal law construing Section 5(A)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a)(1).

34. Like Section 104(a) of the TCPA, Section 5(A)(1) of the FTC Act declares that “[u]nfair or deceptive acts or practices in commerce, are declared unlawful.” *Compare* Tenn. Code Ann. § 47-18-104(a) *and* 15 U.S.C. § 45(a)(1).

35. The TCPA requirement that it be construed consistently with cases construing the FTC Act is mandatory, not permissive. Tenn. Code Ann. § 47-18-115 uses the mandatory term “shall” in stating that the TCPA “shall be interpreted and construed consistently” with the interpretations of § 5(a)(1) of the FTC Act. Tennessee courts uphold this important

legislative mandate. *See, e.g., Tucker*, 180 S.W.3d at 116.

E. The Leading Tennessee Case - *Tucker v. Sierra Builders, Inc.*

36. The leading Tennessee case on unfair and deceptive acts or practices under the TCPA is *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109 (Tenn. Ct. App. 2005). *Tucker* originated as a TCPA suit brought by a consumer for shoddy construction of a modular home. The consumer sued the manufacturer and the contractor and prevailed against both in the court below. While the contractor did not appeal this ruling, the manufacturer appealed on the grounds that it only a manufacturer and not responsible for the contractor's unlawful acts. The court of appeals agreed and reversed the trial court's ruling as to the manufacturer, holding, among other things, that a manufacturer's decision to sell products through an authorized dealer was not an unfair or deceptive trade practice.

37. In *Tucker*, then-Judge Koch wrote the opinion, and presented a thoughtful and thorough analysis of the TCPA:

With the enactment of the Tennessee Consumer Protection Act ("TCPA") in 1977, Tennessee joined the growing number of states that had passed so-called "little FTC acts." The little FTC Acts were so designated because of their similarity to the provision of the Federal Trade Commission Act that outlawed unfair or deceptive trade practices. The TCPA, like the little FTC acts of many other states, explicitly provides that it is to be interpreted and construed in accordance with interpretations of [the FTC Act] by the Federal Trade Commission and the federal courts.

Tucker, 180 S.W.3d at 114-15 (citations omitted).

38. Judge Koch also explained the differences between the TCPA and the common law, along with the remedial nature of the TCPA:

The TCPA was not intended to be a codification of the common law. To the contrary, one of the express purposes of the TCPA is to provide additional,

supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part. Moreover, the TCPA is explicitly remedial, and Tennessee courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere.

The scope of the TCPA is much broader than that of common-law fraud. Under the TCPA, a consumer can obtain recovery without having to meet the burden of proof that is required in common-law fraud cases, and the numerous defenses that are available to a defendant in a common-law fraud case are simply not available to the defendant in a TCPA case.

Id. at 115 (citations omitted).

39. The court analyzed the concepts of “unfair” and “deceptive” under the TCPA, and Judge Koch noted that although Tennessee courts had not had many opportunities to construe the terms “unfair” and “deceptive” under the TCPA, “the Federal Trade Commission and the federal courts have developed a substantial and finely honed body of law construing these terms in the context of the FTC Act.” *Id.* at 116.

40. With respect to deception, Judge Koch stated:

The concept of deceptiveness is a broader, more flexible standard of actionable merchant misconduct than the traditional remedy of common-law fraud. A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact. Thus, for purposes of the TCPA and other little FTC acts, the essence of deception is misleading consumers by a merchant’s statements, silence, or actions.

Id. (emphasis added).

41. With respect to “unfairness,” Judge Koch stated the following:

The concept of unfairness is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive. In the 1994 legislation reauthorizing the Federal Trade Commission, Congress undertook to codify the Commission’s policy statement on unfairness by stating that an act or practice should not be deemed unfair “unless the act or practice causes or is likely to cause substantial injury to

consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

180 S.W.3d at 116-17. Judge Koch further noted that under an ‘unfairness’ analysis, “to be substantial, consumer injury must be more than trivial or speculative” and that substantial injury “usually involves monetary relief or unwarranted health and safety risks. *Id.* at 117.

V. DECEPTION AND UNFAIRNESS UNDER THE TCPA

A. General Considerations

42. The TCPA does not define “unfair” or “deceptive.” *See generally* Tenn. Code Ann. § 47-18-101, *et seq.* *See also Tucker*, 180 S.W.3d at 115. In order to give the broadest scope possible to the protections embodied in the statute, and in order to prevent ease of evasion because of overly meticulous definitions, consumer protection laws like the TCPA typically make no attempt to define “unfair” or “deceptive,” but merely declare that such acts or practices are unlawful, thus leaving it to the court in each particular case to determine whether there has been a violation of the statute. *See D. Zupanec, Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 ALR 3d 449, 458 (1979). *See also Tucker*, 180 S.W.3d at 114; *Pan American World Airways v. United States*, 371 U.S. 296, 307-08 (1963); *State v. Shattuck*, 747 A.2d 174, 179 (Maine 2000) (“Neither term as used in Maine’s UTPA can be precisely defined, and their applicability should be determined on a case by case basis.”).

43. The TCPA was not intended to be a codification of the common law and its scope is much broader than that of common-law fraud:

To the contrary, one of the express purposes of the TCPA is to provide additional supplementary state law remedies to consumers victimized by unfair or deceptive

business acts or practices that were committed in Tennessee in whole or in part.

Tucker, 180 S.W.3d at 114 (citing Tenn. Code Ann. § 47-18-102(2), (4)).

44. Under the TCPA, recovery can be obtained without having to meet the burden of proof that is required in a common law fraud case, and the numerous defenses that are available to a defendant in a common law fraud case are simply not available to a defendant in a TCPA case. *Tucker*, 180 S.W.3d at 114 (citing *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)).

45. The body of jurisprudence governing the enforcement of unfair and deceptive acts and practices spans almost one hundred years and presents a well-defined, comprehensive body of precedent, dating back to when the FTC Act was first enacted in 1914. *See* 15 U.S.C. § 45(a)(1) (1914). *Cf. Tucker*, 180 S.W.3d at 116 (FTC and federal courts developed substantial and finely honed body of law construing FTC Act.).

B. Deception

46. In its Amended Complaint, the State alleges that the acts and practices defendants have committed in connection with their advertisements fall under the category of “deceptive” conduct under the TCPA.

47. Tennessee courts interpreting FTC law have held that under the TCPA, an act or practice is deceptive if it “*causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact.*” *Tucker*, 180 S.W. 3d at 115 (emphasis added). *See also* *FTC v. Consumer Alliance, Inc.*, No. 02C 2429, 2003 WL 22287364 at *4 (N.D. Ill. Sept. 30, 2003); *FTC v. Gill*, 71 F.Supp.2d 1030, 1037 (C.D. Cal. 1999), *aff’d*, 265 F.3d 944 (9th Cir. 2001).

48. Thus, under the TCPA, a plaintiff does not need to prove that any consumer was actually misled or deceived, but only that a defendant's conduct had a "tends" to mislead or deceive. *Tucker*, 180 S.W. 3d at 115.

C. Unfairness

49. "Unfairness" under the TCPA is a separate and legally distinct concept from deception. *Tucker*, 180 S.W.3d at 116 - 17. In *Tucker*, the court properly followed the FTC policy statement on unfairness as set forth in 15 U.S.C.A. § 45(n) and defined "unfairness" as "an act or practice that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id.* (quoting 15 U.S.C.A. § 45(n)).

50. The State alleges that defendants' practice of retaliating against complaining eBay consumers, by automatically posting with negative feedback against any consumer that posts negative feedback against them, falls under the category of "unfair" conduct under the TCPA.

51. Thus, in connection with the State's allegations of "unfair" conduct by the defendants, the State needs to show that the challenged commercial activity:

- (1) Is likely to cause substantial injury to consumers;
- (2) Is not reasonably avoidable by consumers themselves; and
- (3) Is not outweighed by countervailing benefits to consumers or to competition.

Tucker v. Sierra Builders, 180 S.W.3d at 116 (quoting 15 U.S.C.A. § 45(n)).

52. The term "substantial injury," as used in an "unfairness" analysis, means one of two things:

- (1) “[A] relatively small harm is inflicted on a large number of consumers” (which is the case here); or
- (2) “[A] greater harm is inflicted on a relatively small number of consumers.”

Id. (citing *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988)). 51.

53. Moreover, substantial injury “must be more than trivial or speculative.” *Id.*

54. Tennessee courts have also adopted FTC definitions for “unfair” conduct. In *Tucker*, the court defined “unfairness” as an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Tucker*, 180 S.W.3d at 116-17 (quoting 15 U.S.C.A. § 45(n)).

55. Although defendants gloss over the case in their response, defendants clearly confuse the two separate and legally distinct concepts of deception and unfairness with each other, jumbling portions of one definition into the definition of the other.

56. As will be detailed below, deceptive conduct can be found as a matter of law in the present case, because it is readily apparent from the face of defendants’ advertising. Similarly, unfair conduct can be found as a matter of law, because defendants have admitted in engaging in the conduct the State alleges is unfair, *i.e.*, retaliating against complaining eBay customers by automatically posting negative feedback against every consumer who posts negative feedback against defendants. Thus, the material facts which are necessary to establish violations of the TCPA are supplied directly by the defendants themselves, through their own advertising and admissions of record.

VI. THE LAW OF ADVERTISING

A. The Advertising Itself is the Best Evidence

57. It is well settled that the primary evidence in a deceptive advertising case is the advertising itself. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). Thus, the defendants' advertising and marketing representations serve as the best evidence in resolving the question of whether defendants' advertising is deceptive.

58. Thus, the first step a court must take in determining whether a company engaged in deceptive advertising is to look at the advertising itself and determine whether it makes deceptive claims. *FTC v. Nat'l Urological Group.*, No. 1:04-CV-3294, 2008 WL 2414317, *12 (N.D. Ga. June 4, 2008). *See also* *FTC v. QT, Inc.*, 448 F.Supp.2d 908, 957 (N.D. Ill. 2006).

59. FTC case law confirms that "[e]vidence of deception is not necessary 'where the exhibits themselves sufficiently demonstrate their capacity to deceive.'" *Double Eagle Lubricants v. FTC*, 360 F.2d 268, 270 (10th Cir. 1966) (citation omitted). In such a case, a finding of deception by a visual examination will stand even if numerous members of the public were to testify that they were not deceived. *Id.*

B. The Test is "Net Impression"

60. Impressions are the primary targets of ad writers. *Stanley Laboratories v. FTC*, 138 F.2d 388, 392 (9th Cir. 1943).

61. "The test to be used in interpreting advertising is the net impression that the advertisement it is likely to make on the consuming public. *Murray Space Shoe v. FTC*, 304 F.2d 270 (2nd Cir. 1962); *In re Maryland Carpet Outlet, Inc.*, 85 FTC 754 (1965); *Garcia v.*

Overland Bond & Investment Co., 668 N.E.2d 199, 203 (Ill. App. Ct. 1996); *Williams v. Bruno Appliance & Furniture Mart*, 379 N.E.2d 52 (Ill. App. Ct. 1978).

62. "A glance at the advertising is all that is required to determine whether the advertising is deceptive." *Colgate-Palmolive*, 380 U.S. 374 at 391-92; *Williams*, 379 N.E.2d at 54.

63. The meaning of an advertisement, *i.e.*, the claims or net impressions communicated to consumers, may be resolved by the terms of the advertisement itself or by evidence of what consumers interpreted the advertisements to convey. *Nat'l Urological Group*, at *12; *QT, Inc.*, 448 F.Supp.2d at 957-58; *Nat'l Bakers Services, Inc., v. FTC*, 329 F.2d 365, 367 (7th Cir.1964)).

C. Advertisement Must Be Viewed "As a Whole"

64. To place Consumer Depot's advertising in context, the advertisement must be reviewed as a whole. *Removatron Intern. Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989); *American Home Products Corp. v. FTC*, 695 F.2d 681, 687 (3rd Cir. 1983); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976). The important question to be resolved is the impression given by an advertisement as a whole. *U.S. v. 95 Barrels of Vinegar*, 265 U.S. 438, 442-43 (1924); *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1954); *Giant Food, Inc. v. FTC*, 322 F.2d 977, 981-82 (D.C. Cir. 1963).

65. Isolated words or phrases are not part of an advertising analysis. *FTC v. Davison Associates, Inc.*, 431 F.Supp. 548, 559-60 (W.D. Pa. 2006). In determining whether an act or practice is deceptive, courts look at the conduct "as a whole" without emphasizing isolated words or phrases. *Id.*

66. Further, “regard must be had, not to fine spun distinctions and arguments that [Consumer Depot makes] in excuse, but to the effect which it might reasonably be expected to have upon the general public.” *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950); *Commonwealth v. Amcan Enterprises, Inc.*, No. CIV. A. 93-7034-B, 1996 WL 130934, *4 (Mass. Super. Ct. March 20, 1996), *aff’d as modified*, 712 N.E.2d 1205 (Mass. App. Ct. 1999).

D. Advertisements Capable of Two Meanings Are Legally Deceptive

67. If an advertisement is capable of two meanings, one of which is false, it is deceptive as a matter of law. *Giant Food*, 322 F.2d at 981.

E. Disclaimers Must Be Prominent and Unambiguous

68. “Disclaimers or curative language must be “sufficiently prominent and unambiguous” such that the overall net-impression of the communication becomes non-deceptive.” *Removatron*, 884 F.2d at 1497; *Davison Associates, Inc.*, 431 F.Supp. at 560.

E. Advertising Used Merchandise as New is Legally Deceptive

69. It is deceptive to advertise merchandise as new, but sell merchandise that is used, damaged or refurbished. Tenn. Code Ann. § 47-18-104(b)(6) (“Representing that goods are original or new if they are deteriorated, altered to the point of decreasing the value, reconditioned, reclaimed, used or secondhand” is deceptive); *Kerran v. FTC*, 265 F.2d 246 (10th Cir. 1959).

G. Summary Judgment is Appropriate to Resolve Deceptive Advertising

70. “[T]he court is well-equipped to discern express claims or clear and conspicuous implied claims from the face of the advertisement.” *FTC v. Nat’l Urological*

Group., No. 1:04-CV-3294, 2008 WL 2414317, *12, n. 12 (N.D. Ga. June 4, 2008).

71. Courts routinely grant of summary judgment in cases where the deception is apparent from the face of the advertisement. *See, e.g., FTC v. US Sales Corp.*, 785 F.Supp. 737, 748 (N.D. Ill. 1992); *FTC v. Febre*, C.A. No. 94-C-3625, 1996 WL 396117, *1-2 (N.D.Ill. July 2, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997); *FTC v. Wilcox*, 926 F.Supp. 1091, 1099 (S.D. Fla. 1995).

72. "If question of fact exists with respect to a portion of an advertisement, summary judgment may nevertheless be appropriate if the advertisement is otherwise deceptive on other grounds." *FTC v. Febre*, C.A. No. 94-C-3625, 1996 WL 396117, *1-2 (N.D.Ill. July 2, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997).

VII. DEFENDANTS' UNLAWFUL BUSINESS CONDUCT

A. The Advertising at Issue is Undisputed

73. The State filed two volumes of exhibits with its Motion for Summary Judgment, which contain numerous examples of defendants' advertising and marketing representations, as authenticated by various consumers who reported they were misled or deceived by the defendants. *See* Affidavits of consumers Amity Arnes, William Bartling, Harold Bryson, Mark Citro, Justin Kennedy, Gerald Koehler, Justin Kennedy, Mitch Krinsky, Barbara Layton, Veronica LaRock, Brian Lock, John Machata, Chris Martin, Marvin McDermott, Katrina Moultrie, Mark Muto, Chris Myers, Dhamija Pradeep, Ralph Schuler, Kimberly Scripture, Steven Streiff, Gevon Ware, Manuel Weiss, Marvin Weissman, Mary Wilkes and exhibits thereto, STATES'S EXS. VOL. I *and* II, 37-189 and 541-630.

74. While defendants take issue with various points made by these consumer's in

their affidavits, defendants do not dispute the authenticity of their own advertising, which many of the above consumers attach their affidavits. Indeed, as set forth in the Court's Findings of Fact (hereinafter "FF"), above, defendants essentially admit to the authenticity of every single advertisement submitted by every consumer affiant. *See generally* FF 30-285. Moreover, defendants have supplemented the record with essentially identical counterpart excerpts from the very same advertisements. *See* Ex. Z to Fike Aff. Thus, the primary evidence before the Court today, defendants' advertising, is undisputed.

75. The State argues that the complaints of record and their attachments evidence defendants' business acts and practices, and in particular, defendants' regular practice of publishing conflicting and ambiguous advertising messages and disclaimers, which tend to confuse the public and has led to a high volume of complaints against defendants.

76. According to the State, defendants' conflicting messages usually concern product condition, return policies and warranties, but also involve other terms as well.

77. In addition, the State argues that defendants routinely publish important information in fine print, or in a inconspicuous fashion. When considered in the context of defendants' advertisements as a whole, such advertising is deceptive.

78. The State finally submits that defendants regularly assert very strict interpretations of their disclaimers against complaining consumers, to avoid issuing refunds or replacements, even in cases where products were clearly misrepresented.

B. Specific Examples of Deceptive Advertising

79. An examination of the advertising at issue reveals the reason for the consumer affiants' anger and confusion, as defendants' advertising proves highly confusing and

misleading on its face.

80. Much of the defendants' advertising is conducted under various trade names or aliases. One such trade name is Bargain Depot. *See, e.g.*, FF 6-7, 39-78, 87-97, 170-79, 188-199, 223-32, and 253-62. Defendants have published and sold over 100,000 products to date under their Bargain Depot trade name.⁸⁷ As will be demonstrated below, defendants' Bargain Depot advertising gives the overall net impression that "New" merchandise is being sold. In truth and in fact, however, while some new merchandise is sold under defendants Bargain Depot alias, defendants also sell *Used* merchandise under this trade name.

76. For example, the evidence submitted by consumer Amity Armes and other bargain depot purchasers proves instructive. Ms. Armes bought what she believed was a "Brand New" iPod armband from Consumer Depot which was advertised as *New*, but arrived covered in someone else's blood and sweat. *See Armes Aff. and Exs thereto*, STATE'S EX. VOL II, 552-59. As already noted, these facts are not disputed by defendants.

77. The Bargain Depot header or advertising banner which defendants published in Ms. Armes' auction, and indeed, in all of the 100,000 plus separate Bargain Depot advertisements they have published to date, contains the following prominent representation, as set forth in **Figure 13**, below:

⁸⁷ The feedback references which appear on the first page, or very top portion of defendants' bargainindepot04 eBay auctions shows feedback posting by over 100,000 consumers. *Id.* These posting are consistent with defendants' sales volumes, which defendants admit surpass the 600,000 mark. FF 325.

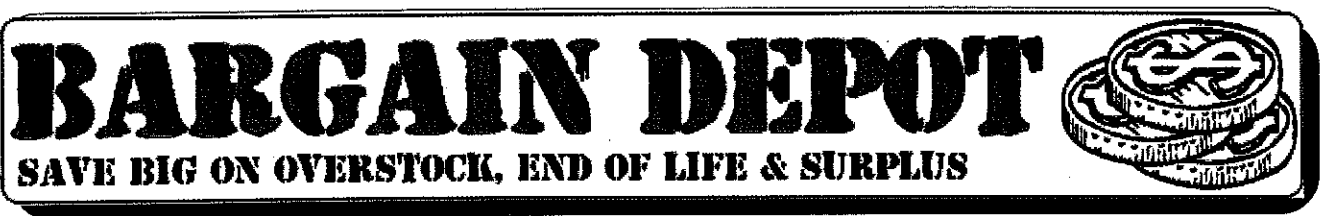


Figure 13

*See, e.g., Ex. A to Armes Aff., STATE'S EX. VOL II, 547.*⁸⁸

78. Significantly, defendants prominently publish the terms "OVERSTOCK" "END OF LIFE" and "SURPLUS" in each Bargain Depot advertisement. *See* FF 6-7, 39-78, 87-97, 170-79, 188-199, 223-32, and 253-62.

79. The terms "OVERSTOCK" "END OF LIFE" and "SURPLUS" clearly denote that new merchandise is being sold, which may consist of excess inventory, left-over unsold merchandise, or outdated but new merchandise.

80. However, as seen in Figure 14, right, in a later, "fine print" section of the Bargain Depot advertising, and well below the first half of the advertisement, defendants publish a small "About Our Products" section, which says something different.

About Our Products

As one of the nation's largest liquidators, BargainDepot04 offers tremendous savings on open box - surplus, obsolete, end of life inspected returns. Our products come from some of the largest Retailers in America. Many of these items are in like new condition. These items are an excellent value for much less than retail. We make every attempt to photograph and describe the items accurately. Because these products are open box, there is a risk that the item may be incomplete and/or show some signs or wear. We offer a 7 day return policy on items other than consumables.

Figure 14

⁸⁸ *See also* Ex. A to Bartling Aff., Citro Aff., Coffman Aff., Krinsky Aff., Lock Aff., Machata Aff., Muto Aff., Myers Aff., Reisdorf Aff., Stein Aff., Walsh Aff. *and* Weissman Aff. STATE'S EX. VOLS I AND II, 45-50, 69-84, 110-23, 161-67, 552-561, 567-584, 593-602, 605-21, *and* 631-40.

See Ex. A to Armes Aff., STATE'S EX. VOL II, 548-49. In particular, and for the first time, defendants add a new descriptive term to their "SURPLUS," "OBSOLETE" and "END OF LIFE" language, and change "END OF LIFE" to "end-of-life inspected **returns**." *Id.* (emphasis added). Thus, defendants are sending two different messages about their products: The products are "New" *and* the products are "Used." *Id.* This type of additional language appears in every Bargain Depot advertisement in the record.

79. Viewed "as a whole," such advertising is deceptive as a matter of law. Tenn. Code Ann. § 47-18-104(b)(6); *Kerran v. FTC*, 265 F.2d 246 (10th Cir. 1959).

81. The context of the Bargain Depot advertising becomes even more troubling, when one sees exactly where the second, "inconsistent" advertising message appears. At left, as **Figure 15**, is an advertisement that has previously been identified as **Figure 2** in this Court's Findings of Fact, *supra*. Viewed as one, single, long page, much in the way a web page would appear if it was printed as one long document, one sees that the inconsistent message comes well after the first half of the page.

82. The inconsistent message also comes well after the prominent *Overstock, Surplus & End of Life* merchandise banner. *Id.*

83. Thus, Consumer Depot's undisputed Bargain Depot advertising is *deceptive on its face*, because while the advertising clearly promises or implies that *New* merchandise in the form of *Overstock*,

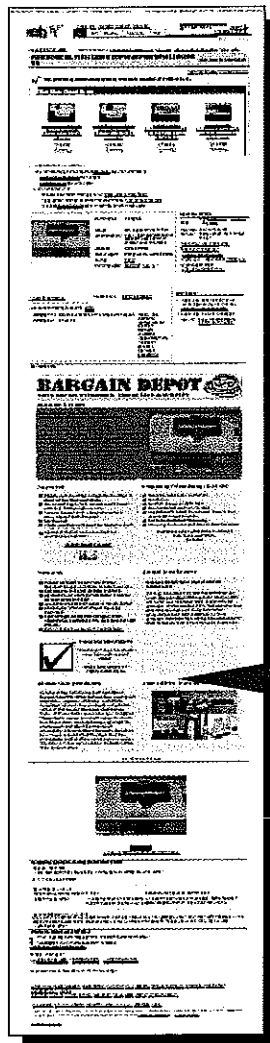


Figure 15

Surplus & End of Life product is being sold, defendants are also selling *Used* merchandise through bargain Depot. Such business practice is deceptive as a matter of law. *See* Tenn. Code Ann. §§ 47-18-104(b)(2), (5)-(7), (9), (12), (19), (21) and (27) and Tenn. Code Ann. §§ 47-18-113. *See also* *Giant Food*, 322 F.2d at 981; *Removatron*, 884 F.2d at 1497; *Davison Associates, Inc.*, 431 F.Supp. at 560.

84. The State has therefore establish it is entitled to judgment as a matter of law under both Counts I and II of the Amended Complaint.

85. The State also provided similar examples of defendants' inconsistent advertising messages with respect to their so-called return policies and warranties. For example, the State submitted examples of defendants' advertising which stated that defective products were returnable, but also made reference to an "As Is" sale restriction, which defendants have

acknowledged they assert to mean that products are not returnable, no matter what. *See, e.g.*, FF 79-97, 133-40, 149-69, 263-86, 288-90, and 297-300.

86. At right, as Figure 16, is an

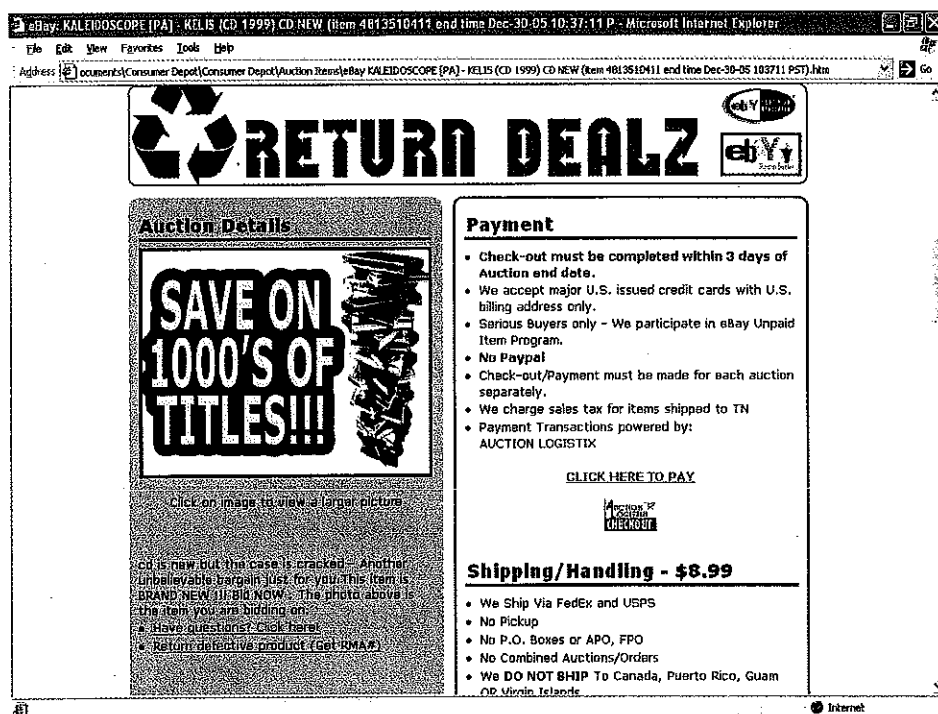


Figure 16

excerpt from the exhibit accompanying consumer Katrina Moultrie's affidavit. *See* FF 133-40 and STATE'S EX. VOL. I, 109.

87. Figure 16 clearly advertises a link to "**Return Defective Product (Get RMA#)**," which naturally tells the consumer that defective products are returnable. *Id.* But upon examination as a whole, one sees that in the very same auction, defendants also posted "**All Sales Final - Sold As Is - No Returns**" messages as well. *Id.* Such advertising readily tends to be confusing, because at best, it could be interpreted that while merchandise is not returnable generally, it is returnable if it is defective.

88. Defendants have admitted, however, that their own "personal" interpretation of the term "As Is" or other similar return policies or disclaimers, is that merchandise is not returnable under any circumstances, even if it is defective or had been misrepresented. *See* FF 286, 288-90, and 297-300. Such business practice is deceptive as a matter of law. *See* Tenn. Code Ann. §§ 47-18-104(b)(5), (9), (12), (19), and (27) and Tenn. Code Ann. §§ 47-18-113. *See also Giant Food*, 322 F.2d at 981; *Removatron*, 884 F.2d at 1497; *Davison Associates, Inc.*, 431 F.Supp. at 560.

89. The State has therefore establish it is entitled to judgment as a matter of law under both Counts I and II of the Amended Complaint, in that defendants' conduct violates Tenn. Code Ann. § 47-18-104(a) and § 47-18-104(b).

C. Defendants' Conduct is Unfair

90. The States submits that the single best example of unfair conduct by defendants has to do with their practice of retaliating against consumers who leave them negative feedback on eBay, by automatically posting negative feedback against those consumers.

→ 91. Numerous consumers have complained about undeserved, retaliatory negative feedback they received from Consumer Depot after posting such feedback for Consumer Depot's misleading or false advertising. *See* FF 39-232, 253-285 (Amity Armes, William Bartling, Mark Citro, Justin Kennedy, Gerald Koehler, Justin Kennedy, Mitch Krinsky, Barbara Layton, Veronica LaRock, Brian Lock, John Machata, Chris Martin, Marvin McDermott, Katrina Moultrie, Mark Muto, Chris Myers, Dhamija Pradeep, George Reisdorf, Ralph Schuler, Kimberly Scripture, Steven Streiff, Gevon Ware, Marvin Weissman, and Mary Wilkes).

92. Based on the law of "unfairness," such conduct "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Tucker*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)). Consumer Depot's acts and practices in connection with their customers, *i.e.*, retaliation against complaining consumers with negative feedback, has caused harm to a very high number of consumers (over 20,000 based on the negative feedback records filed as Ex. A to the State's Amended Complaint), and was not reasonably avoidable by the consumers because by paying promptly as required, they had no reason to fear such retaliation. *Id.*

VIII. ALL DEFENDANTS ARE LIABLE FOR CONSUMER DEPOT'S UNLAWFUL CONDUCT

93. An individual defendant is liable for the unfair or deceptive trade practices of an entity if the individual (1) has the authority to control the entity and has some knowledge of the wrongful acts or practices, or (2) directly participates in the wrongful acts or practices.

FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

94. All of the defendants have admitted and have been found by this Court to actively participate in Consumer Depot's conduct, with authority to control Consumer Depot. *See* Dec. 22, 2008 Order Granting Partial Summary Judgment. *See also* FF 1-29.

95. Based on its previous rulings in the Dec. 22, 2008 Order Granting Partial Summary Judgment, the Court finds that all defendants and individually and jointly liable for acts of unfair and deceptive practices of Consumer Depot.

IX. THE STATE HAS CARRIED ITS SUMMARY JUDGMENT BURDEN

96. The Court finds that as the moving party, the State has carried its burden of establishing that there are no material facts in dispute and the State is entitled to summary judgment as a matter of law. *Martin v. Norfolk*, 271 S.W.3d at 83; *Byrd v. Hall*, 847 S.W.2d at 215.

97. Under Tennessee summary judgment standards, the burden has therefore shifted to defendants to come forward with evidence showing either that there are genuine issues of material fact in dispute, or that the State is not entitled to summary judgment as a matter of law. *Martin*, 271 S.W.3d at 84; *McCarley*, 960 S.W.2d at 588.

98. Defendants submitted a sixty-eight page response, supported only by a single affidavit, albeit a fifty-eight page affidavit, from defendant Martin Fike. Mr. Fike's affidavit cites to over nine hundred pages of documents which have been included as exhibits to his affidavit. *See* Affidavit of Martin Fike and Exs. A - Z, thereto. The State argues that the bulk of defendants' submission is an effort to manufacture a dispute where none exists, and consists

mostly of irrelevant, unauthenticated documents.

99. Defendants have apparently taken Mr. Fike's fifty-eight page affidavit, and broken it down into a Statement of Additional Facts, comprising almost four hundred additional facts defendants contend are material to the issues presently before the Court. The State challenges the bulk of this submission as constituting irrelevant, unauthenticated information, and contends defendants have failed to carry their burden of overcoming summary judgment.

**X. DEFENDANTS' FACTUAL SUBMISSION IS
MOSTLY IRRELEVANT AND INADMISSIBLE**

100. A review of Consumer Depot's response indicates it consists of undated, unauthenticated and inadmissible hearsay, primarily in the form of third-party material defendant Fike apparently found somewhere on the internet. *See* Exs. A-Y to Fike Aff.

101. Moreover, most of the legal arguments Consumer Depot makes in opposition to summary judgment are made in Mr. Fike's affidavit, but consist of nothing more than "reargument" of the very same affirmative defenses this Court previously considered and rejected as a matter of law. *See* December 22, 2008 Order Granting Partial Summary Judgment. DKT. 198.

102. While Consumer Depot's submission is lengthy, it will be briefly be reviewed here exhibit by exhibit, to afford defendants every last benefit of the doubt.

A. The Evidentiary Flaws in Martin Fike's Affidavit

103. Tenn. R. Civ. P. 56.06, entitled "**Forms of Affidavits - Further Testimony - Defense Required**" provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleadings, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is no genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

See Tenn. R. Civ. P. 56.06 (emphasis added). As demonstrated below, defendants' opposition consists primarily of unsupported allegations and denials, and fails to set forth specific facts showing there is a genuine issue for trial. In addition, it purports to dispute consumers' personal accounts of their experiences with defendants, even though defendants have no basis for making such disputes.

104. For example, consumer Mark Citro received a nonfunctional PDA from defendants. *See* FF 62-69.

105. In his Affidavit, Mr. Fike testifies under oath that Mr. Citro's auction stated "MAY SHOW SIGNS OF USAGE" and "MAY BE MISSING SOFTWARE AND ACCESSORIES . . . HAS A THIRD PARTY STYLUS AND NO PLUG ADAPTERS."

106. These statements in Mr. Fike's Affidavit purport to the actual auction page, in large, prominent capital letters. *See* Fike Aff., ¶ 48. However, to the extent some of these statements appear in Mr. Citro's auction, they only appear in fine print, two thirds of the way through the auction, after the **Bargain Depot** banner ad and after the first buying opportunity has been presented. *Compare* Fike Aff. ¶ 48 *and* Ex. A to Citro Aff. Thus, as the Court already noted, to place Consumer Depot's advertising in context, the advertisement must be reviewed as a whole. *Removatron Intern. Corp. v. FTC*, 884 F.2d at 1496; *American Home Products Corp. v. FTC*, 695 F.2d at 687; *Beneficial Corp.*, 542 F.2d at 617. (3rd Cir. 1976). Isolated words or phrases, as defendants present now, are not part of an advertising analysis. *Davison Associates, Inc.*, 431

F.Supp. At 559-60. Further, "regard must be had, not to fine spun distinctions and arguments that [Consumer Depot makes] in excuse, but to the effect which it might reasonably be expected to have upon the general public." *P. Lorillard Co.*, 186 F.2d at 58.

107. Disclaimers or curative language, like what defendants quote now, must be "sufficiently prominent and unambiguous" such that the overall net-impression of the communication becomes non-deceptive." *Removatron*, 884 F.2d at 1497; *Davison Associates, Inc.*, 431 F.Supp. at 560. Moreover, using an ambiguous term like "MAY," is not a meaningful and responsible way to advertise.

B. The Evidentiary Flaws in Defendants' Exhibits

108. The exhibits which accompany Mr. Fike's affidavit are also mostly inadmissible. For example, Exs. A, H, and W, which consist of unidentified and unauthenticated material printed from some unspecified internet page site, proves nothing. *See Fike Aff.*, Exs. A, H and W. Moreover, defendants are presumably submitting this piece of paper to show that Consumer Depot has an allegedly better "rating" than other retailers, presumably in support of their "everyone else does it too" defense.

109. This court previously ruled as a matter of law, that what other companies may or may not do in the marketplace is legally irrelevant to the question of whether defendants engaged in deception. *See Dec. 22, 2008 Order, DKT. 198.*

110. The law has long recognized that even if deceptive conduct has become a common, recognized part of a particular industry, such fact will not operate as a defense. *See, e.g., FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 - 94 (1922). Similarly, a practice does not cease to be unlawful simply because its deceptive nature is well known to industry.

Heavenly Creations, Inc. v. FTC, 339 F.2d 7, 8 (2d Cir. 1964). Unfair and deceptive conduct can never be justified on the grounds that it is needed either as a service to the consumer or to meet competition in the market. *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59, 64 (7th Cir. 1974).

111. Numerous consumer protection enforcement cases have thus rejected the notion that a particular business custom or practice is a defense for unlawful business conduct. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59 (7th Cir. 1974); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 276 (6th Cir. 1970); *Heavenly Creations, Inc. v. FTC*, 339 F.2d 7 (2d Cir. 1964); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961).

112. Similarly, Exs. B - D, and I, to Mr. Fike's affidavit consists of three pages of undated, unidentified and unauthenticated material which Mr. Fike apparently found somewhere on eBay. *See Fike Aff.*, Ex. B. Ex.C to Mr. Fike's affidavit consists of a number of pages of undated, unidentified and unauthenticated material which Mr. Fike apparently found somewhere on the internet and on eBay. *See Fike Aff.*, Ex. C.

113. Exs. E1 - E2 to Mr. Fike's affidavit consists of a single page of illegible material, printed in "micro-print" sizes, of unidentified, unauthenticated and incomplete advertisements, presumably used in commerce by Consumer Depot as of March 2009. *See Fike Aff.*, Ex. E1. The defendants are presumably submitting this piece of paper to provide an example of what their current eBay advertisements look like, but provide an essentially illegible document that appears to only contain 2 to 3 page excerpts, out of what translates into an 6 - 7 page auction page. Again, defendants overlook a fundamental principle of advertisement law, which requires that an advertisement be viewed as a whole. Selected excerpts, as already noted above, are not relevant.

114. Exs. F1-G2 to Mr. Fike's affidavit consists of a single page of incomplete and partially illegible material, presumably submitted by Consumer Depot to show what its eBay feedback numbers were at certain points in time. *See Fike Aff.*, Ex. F1. There is no explanation as to how the defendants arrived at these numbers nor how they were calculated. Moreover, while these numbers seem significantly higher than what other documents produced in this litigation show, the undisputed fact remains that Consumer Depot's eBay feedback percentages are still dismal and low and only confirm the fact that Consumer Depot had very high negative feedback from consumers on eBay as a result of its eBay conduct. Thus, rather than dispute any negative feedback issues raised by the State, defendants have merely reaffirmed them.

115. Defendants also use questionable calculations in their effort to make themselves look better in the eyes of the Court. For example, on Ex. G1, beneath each designated year, there is a notation from defendants stating that their so-called feedback numbers consist of "**Total % Feedback % minus Not Paid %.**" Thus, in arriving at what looks like higher-than-usual positive feedback percentages for recent years, the defendants generously eliminated all the negative feedback non-paying bidders left for them. Even then, the undisputed fact remains that Consumer Depot's eBay feedback percentages as displayed on Exhibit G1 are still dismal and only confirm the fact that consumers remain very unhappy with Consumer Depot's business practices.

116. In sum, the methodology Consumer Depot has used here to try to convince the Court that its objective feedback numbers portray an outstanding eBay seller is nothing more than the methodology its uses in its deceptive advertising and business practices - all designed to benefit Consumer Depot at the expense of the public.

117. Ex. J to Martin Fike's affidavit consists of a three pages of photographs,

illegible material printed in "micro-print" and a chart. The photographs are unauthenticated and undated, the micro print is totally illegible and the chart appears to be nothing more than some unidentified chart. Unauthenticated, undated and completely illegible documents prove nothing.

118. Ex. K to Mr. Fike's affidavit consists of a single page of undated, unidentified and unauthenticated material which Mr. Fike or someone else, apparently wrote up to present feedback examples of other alleged liquidators. *See Fike Aff., Ex. K.* The defendants are presumably submitting this piece of paper to show that some other eBay sellers also have low negative feedback ratings, but once again, fail to understand that what "others" might or might not do on eBay is completely irrelevant to the question of whether Consumer Depot engaged in deception.

119. Ex. L to Martin Fike's affidavit consists of five pages of alleged excerpts from Consumer Depot's eBay auctions, displayed once again without the context of the complete advertisements. Moreover, there is no indication as to when such "excerpts" were in use. *See Fike Aff., Ex. L.*

120. Ex. M to Martin Fike's affidavit consists of a single page document displaying information about the "detailed information" it maintains on all communications between itself and its customers. Again, this information is not relevant to the issues before the Court.

121. Ex. N to Martin Fike's affidavit consists of nine pages of communications with the State, intermixed with some unidentified and unauthenticated third party material relating to the

Better Business Bureau. Its relevance is unclear.

122. Exs. O-Q to Mr. Fike's affidavit appear to consist of unauthenticated third party advertisement that Mr. Fike or someone found somewhere. *See Fike Aff., Ex. M.* Most of it is also undated and unidentified, and the last two pages are illegible. *See Fike Aff., Ex. O.* For reasons already set forth above, such information is unauthenticated, irrelevant and constitutes inadmissible hearsay.

123. Ex. R to Mr. Fike's affidavit consists of a thick stack of papers of alleged excerpts from Consumer Depot's retail store, website and eBay auctions. Once again, Consumer Depot is producing excerpts without the context of the complete advertisement, as required by law. Moreover, there is no indication as to when such "excerpts" were in use. *See Fike Aff., Ex. R.* Consumer Depot has also once again overlook a fundamental principle of advertising law that requires that advertisements be viewed as a whole, in context of the entire advertisement, and based on a "net impression," not a selected, dissected, self-serving excerpt.

124. Ex. S to Mr. Fike's affidavit appears to pertain to some government advertising, in the form of unauthenticated third party advertisement that Mr. Fike or someone else found somewhere. It is nothing more than unauthenticated third party hearsay documents which is also undated and unidentified. *See Fike Aff., Ex. S.*

125. Ex. T to Mr. Fike's affidavit consists of a three page document containing three emails. One email thread appears to be directed to Consumer Depot, but two other emails are difficult to identify. The State alleges Consumer Depot has not produced such information to the State in response to its discovery requests and as Ordered to do so by this court. Nevertheless, even if it had, such information is not relevant to any of the

issues presently before the Court.

126. Ex. U to Mr. Fike's affidavit consists of a number of pages of garbled, unauthenticated computer code, presumably being offered up to show how Consumer Depot's automated software creates eBay auctions. In truth, this exhibit really proves nothing and again, is not relevant in the present context.

127. Ex. V to Martin Fike's affidavit consists of a number of pages containing consumer communications, sales records. auction excerpts three emails. Its relevance is unclear.

128. Exhibit X to Martin Fike's affidavit consists of a two page containing a list of names relating to alleged consumer complaints from 2004. It is not clear what this list proves, and it is not submitted along with the related advertisements. Exhibit X2 purports to be a one page copy of an unsigned letter from Carol Fike to DCA Complaint Specialist Joyce Hughey, and Ex. X3 to Martin Fike's affidavit purports to be a copy of a thirteen page unsigned letter from Carol Fike to AAG Leigh Ann Roberts. It is not clear what point Consumer Depot is making. Ex. X3 consists of a number of pages containing consumer communications, sales records. auction excerpts three emails. Ex. X4 to Martin Fike's affidavit purports to be a collection of emails between Consumer Depot and DCA and its relevance is unclear. Once again, the purpose of these exhibits remains unclear.

129. Ex. Y to Martin Fike's affidavit purports to be an invoice relating to a purchase made by consumer Harold Bryson, which was already submitted by the State. Its purpose is unclear.

130. Ex. Z to Mr. Fike's affidavit purports to be a collection of the same affidavits submitted by the State in support of its motion for summary judgment, but with additional documents attached by defendants, many of which do not appear to be authentic. By submitting and relying upon this exhibit, Consumer Depot has effectively admitted that all the advertising it now relies on is authentic and admissible.

XI. DEFENDANTS MISAPPREHEND THE APPLICABLE LAW

A. Defendants Misapprehend the Attorney General Role as *Parens Patriae*

131. Defendants' response confirms they mistakenly think that this case is about refuting individual consumer complaints. Indeed, the bulk of Martin Fike's affidavit attempts to refute the consumer affidavits rather than the underlying advertising and business conduct. Defendants continue to misapprehend the Attorney General's sovereign role as *parens patriae* and fail to understand that the legal standards in civil enforcement proceedings are substantially different from the standards in private civil cases. Defendants thus rely on an assemblage of inapplicable exhibits and law and "argue away" the sworn statements of consumer victims in this case, without realizing that it is their underlying advertising and business practices, which are at issue and control this case.

132. Under the doctrine of *parens patriae*, the State acts in its quasi-sovereign capacity in a protective capacity, and "becomes, in effect, the embodiment of its citizens. A harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff." *State by Humphrey v. Standard Oil Co.*, 568 F.Supp. 556, 565 (D. Minn. 1983).

133. The doctrine does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *State v. Cross*

Country Bank, Inc., 703 N.W.2d 562, 569 (Minn. 2005).

134. According to Black's Law Dictionary (8th ed. 2004), *parens patriae* literally means "parent of his or her country" and describes the role of the State as sovereign protecting its citizens. Tennessee has long recognized that "[a]s the chief law enforcement officer of the state, the attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection." *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1991).

135. Thus, "[a]n action filed by the Attorney General under the Act is essentially a law enforcement action designed to protect the public, not to benefit private parties." *People ex rel Hartigan v. Lann*, 587 N.E.2d 521, 524 (Ill. App. Ct. 1991). The State "is pursuing its claim, not with the purpose of obtaining relief for particular victims,⁸⁹ but to vindicate a 'quasi-sovereign' interest: protecting ... its citizens." *Cross Country Bank*, 703 N.W.2d at 569; *Standard Oil Co.*, 568 F.Supp. at 563 ("A state maintains a quasi-sovereign interest where the health and well-being of its residents is affected").

136. As one court noted,

Just as the state does not step into the shoes of victims of crime when it acts in its prosecutorial role, the state does not step into the shoes of individual [consumers] in this case but acts as an independent party. The state is asserting a state interest that is based on the facts involving individual [consumers]

People ex rel. Hartigan v. Lann, 587 N.E.2d 521, 524-25 (Ill. App. Ct. 1991). Throughout

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The State's interest in protecting its citizens and enforcing state law is paramount. In consumer protection cases, the State typically seeks the ancillary equitable remedy of restitution, as well as statutory penalties, costs and fees. Even though restitution may compensate individual victims, it is an *ancillary* equitable remedy and not part of the primary enforcement proceeding. See e.g., *People v. Superior Court (Jayhill)*, 507 P.2d 1400, 1402 (Cal. 1973).

their response, defendants approach this case as if it were a litigation between themselves and the individual consumer victims in this case. Defendants misunderstand the nature of a civil prosecution and their misunderstanding manifests through their assertion of numerous legally irrelevant and inapplicable defenses and facts.

B. Defendants Misapprehend the TCPA

137. The State's opening memorandum sets forth a detailed deception and unfairness analysis, which will not be repeated here. However, defendants have departed so far from the TCPA standards established in Tennessee, that brief comment is warranted.

138. As for unfairness, the State is asserting an unfairness cause of action only with respect to its retaliation claim, *i.e.*, defendants engage in the unfair practice of retaliating against complaining consumers by automatically posting negative feedback against them on eBay, regardless of the merits of the complaint.

139. As a result of Consumer Depot's heavy-handed retaliation, the public, self-regulating aspects of eBay have been undermined and Consumer Depot enjoys a higher positive eBay rating than it really deserves. Consumer Depot's retaliatory conduct causes or is likely to cause substantial injury to consumers by inflicting the harm of undeserved negative feedback on a large number of consumers [at least 19,000], which is not reasonably avoidable by consumers themselves and has no countervailing benefits to consumers or to competition. *Tucker v. Sierra Builders*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)).

C. Defendants Misapprehend Tennessee Summary Judgment Standards

140. Defendants make much of the fact that the State has submitted affidavits in support

of its motion, as if this type of submission was inappropriate. "Typically, the moving party presents facts to the court in the form of affidavits, authenticated documents, depositions, and other properly-verified factual matters developed through the discovery process." *Summers v. Cherokee Children & Family Services, Inc.*, 112 S.W.3d at 510. Moreover, "[p]leadings, depositions, answers to interrogatories, admissions on file, and affidavits are specifically allowed to be considered in the determination of whether a genuine issue of material fact exists and whether the moving party is entitled to judgment." *Summers v. Cherokee Children & Family Services, Inc.*, 112 S.W.3d at 510 (citing Tenn. R. Civ. P. 56.04).

141. While the State has to go to the trouble of authenticating its submission where appropriate, defendants seem to think they can pretty much authenticate anything they find on the internet or elsewhere. *See generally* Fike Aff. And Exhibit A - Y thereto. This is improper as a matter of law.

142. "The proffered sworn-to testimony and/or properly authenticated documents must be admissible at trial before they can be considered by the trial court on summary judgment." *Summers v. Cherokee Children & Family Services, Inc.*, 112 S.W.3d at 510.

143. Moreover, "[t]he mere submission of a statement of undisputed material facts by the moving party does not, in of itself, constitute proof of the facts therein. However, when the opposing party agrees that a fact is not disputed pursuant to Tenn. R. Civ. P. 56.03, the court may rely upon that admission in determining whether a genuine issue of material fact exists." *Id.*

144. Here, Consumer Depot has admitted to the majority of the facts submitted by the State, and rather than dispute the validity of defendants' objections to its remaining facts, the State has agreed to move forward on the basis of the undisputed facts only. Thus, even if defendants submission had been properly authenticated and supported, it proves unnecessary, as the material

facts in this case remain undisputed.

XII. DEFENDANTS' REMAINING DEFENSES ARE INVALID

A. There is No Such Thing as "Just a Little" Deception

145. Finally, it should be noted that courts regularly reject defense arguments which attempt to downplay or minimize deceptive conduct. *See, e.g., FTC v. Wilcox*, 926 F.Supp. 1091, 1099 (S.D. Fla. 1995). Indeed, the State is aware of no instance where such a defense has been successful.

146. In *Wilcox*, 926 F.Supp. at 1099, the court rejected such a defense in a case where the defendant's business volume was much larger than defendants' volume of business here - at least fifty to seventy-five times greater. Defendants claim that their total business volume is 650,000 transactions. Assuming *arguendo* this is true, the *Wilcox* case described business volumes as high as 50 million separate mailings. *See Wilcox*, 926 F.Supp. at 1096.

147. There, the defendants unsuccessfully argued that the sixty-five sworn consumer declarations and ten thousand postal inspector complaints proffered by the FTC were insufficient to prove deception under the FTC Act, because this evidence constituted such a small percentage of their total mailings. The defendants were direct mail operators, and sent deceptive solicitations to consumers throughout the country. Their solicitations promised gifts and large sums of money upon payment of a small fee.

148. As here, the defendants also operated under a number of different aliases. The defendants' business volume was huge:

The response to these solicitations was tremendous; the defendants received hundreds of thousands of pieces of mail, averaging on each day eighteen U.S. Postal Service mail tubs filled with letters one and a half feet high.

926 F.Supp. at 1096. The *Wilcox* court also rejected the “satisfied customer” defense, holding that “even the existence of some satisfied customers would not be a defense to liability.” *Id.*

149. In a fourteen month period, the *Wilcox* defendants sent more than 35 million pieces of mail, and in a three year period, they sent at least 50 million solicitations. 926 F.Supp. at 1096. The *Wilcox* volume is almost 1,000% greater than the 600,000 - 650,000 volume Consumer Depot and Martin Fike claim they have handled since 2002, although such claim remains unsubstantiated to date.

150. In *Wilcox*, the defendants’ solicitations promised consumers that for a payment of a small fee, (always under \$20), consumers would receive several thousands of dollars in cash in income tax refunds, or an award, prize or free gift. In actuality, however, responding consumers typically received a very small amount of money, gifts or prizes of negligible value, or nothing at all.

151. The court rejected the defendants’ “small percentage of sales” argument, quoting *FTC v. US Sales Corp.*, 785 F.Supp. 737, 748 (N.D. Ill. 1992), for the proposition that all the FTC needs to show in a deception case is that “it is likely, not that it is certain, that a reasonable consumer would be misled . . . the FTC does not need to show that every reasonable consumer would be misled by the advertisements . . . Indeed, advertisements are illegal if they have a ‘tendency’ or ‘capacity’ to deceive; actual deception of particular consumers need not be proven.” *Id.* (emphasis added). The FTC prevailed on summary judgment and obtained a permanent injunction.

152. Another instructive case on point is *FTC v. US Sales Corp.*, 785 F.Supp. 737 (N.D. Ill. 1992). In this case, the defendant was sued for deception in connection with his

sales and advertising of repossessed vehicles and secured credit cards through a 900 number. The FTC alleged that the defendant lacked a basis for his advertising, and falsely promised an 800 number for consumers to use.

153. The FTC submitted some affidavits in support of its position, and defendant countered by arguing that the FTC had only come forward with only a small sample of consumer complaints. The court rejected this argument, noting that all the FTC needs to show is that it is "*likely*," not "*certain*," that a reasonable consumer would be misled, and that advertisements are illegal if they have a "tendency" or "capacity" to deceive; actual deception of particular consumers need not be proven. 785 F.Supp. at 748 (emphasis added).

154. Courts have similarly rejected defense arguments that modest amounts of consumer injury should preclude relief. For example, in *F.T.C. v. Pantron*, 33 F.3d 1088 (9th Cir. 1994), the Ninth Circuit Court of Appeals reversed a trial court decision refusing to order restitution and disgorgement, on the grounds that FTC had failed to prove deception and restitution. Among other things, the trial court held that the small amount of injury suffered by each individual consumer could preclude restitution or disgorgement.

155. The Ninth Circuit reversed, holding that consumer injury is substantial when it is the aggregate of many small individual injuries.

156. Similarly, in *Commonwealth v. Amcan Enterprises, Inc.*, 1996 WL 130934 (Mass. Super. 1996), *aff'd as modified*, 712 N.E.2d 1205 (Mass. App. Ct. 1999), the court granted summary judgment to the Attorney General in a case which involved over 2.3 million deceptive solicitations by defendants. Defendants published a yellow pages directory and sent solicitations to businesses which implied that a listing was being renewed.

157. The Attorney General argued that extrinsic evidence of deception was not required, because the defendants' solicitations were deceptive on their face. Nevertheless, the Attorney General submitted nine affidavits from deceived individuals and evidence that the Attorney General's office had received at least 75 complaints about the defendants' solicitations. 1996 WL 130934, at * 2.

158. In the case at hand, the Attorney General similarly argues that much of defendants' advertising is deceptive on its face, but has also submitted over thirty consumer affidavits, along with evidence that these defendants have generated thousands of complaints.

159. The court granted summary judgment to the Attorney General and held that the solicitations were "deceptive as a matter of law without resort to extrinsic evidence." *Id.*, * 5. Neither the affidavits nor the complaint evidence was necessary to the court's finding of deceptive conduct.

160. As a final matter, it should also be noted that final judgments deception cases, along with permanent injunctions and restitution remedies, are routinely granted in enforcement cases on the basis of a very limited amount of consumer testimony at trial. *See, e.g., State v. Master Distributors, Inc.*, 615 P.2d 116 (Idaho 1980) (granting permanent injunction and restitution to 300-400 injured consumers on the basis of testimony of fifteen (15) consumers).

B. Deception Cannot Be Disclaimed ("As-Is" Is Not a Defense)

161. Defendants make much of their alleged disclaimers, repeatedly claiming that such things as "As-Is" terms, other disclaimers and return policies and procedures were "CLEARLY" posted in their auctions. *See generally* Fike Aff.

162. Defendants also seem to think that terms like "MAY" "MIGHT"

“UNTESTED,” which leave the material information ambiguous, get them “Off the Hook.” Defendants seem to think that by posting such alleged disclaimers, they can immunize themselves from accountability for deception and can freely hide behind these disclaimers, many of which are often hidden themselves.

163. The law is clear: Deception can not be disclaimed. *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 539-40 (Tenn. 1992); *FTC v. U.S. Sales Corp.*, 785 F.Supp. 737, 745 (N.D. Ill. 1992); *Garcia v. Overland Bond & Investment Co.*, 668 N.E.2d 199, 204 (Ill. App. Ct. 1996). The Tennessee Supreme Court put this issue to rest over sixteen years ago, but defendants neglect to note this point anywhere in their response.

164. In this context, it is also important to remember that deception can occur by implication. An excellent example of deceptive advertising by way of implication may be found in *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992) (hereinafter “the Kraft Cheese case.”) This case also illustrates how a literally true advertisement can be deemed deceptive.

165. Defendants make the astonishing argument that the TCPA expressly incorporates the Uniform Commercial Code and its provisions on disclaimers, and that therefore, disclaimers are enforceable in TCPA cases. As before, defendants cite no authority in support of their argument, and as before, there is no authority in support of this point.

166. Defendants ignore the leading Tennessee case on point of *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 539-40 (Tenn. 1992). In *Mack's Used Cars*, the defendants there made the same argument as the defendants here, claiming that when disclaimers are part of a written contract, they are enforceable under Tenn. Code Ann. § 47-18-113.

167. The Supreme Court flatly rejected this argument and explicitly held that

disclaimers under “the Uniform Commercial Code (UCC) may limit or modify liability otherwise imposed by the code, but such disclaimers do not defeat separate causes of action for unfair or deceptive acts or practices under the Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101 to -5002.” *Id.* (emphasis added).

168. The Supreme Court held that the UCC contemplates the application of supplemental laws in commercial transactions, and that the TCPA is cumulative and supplementary to all other powers and remedies otherwise provided by law.

169. The Supreme Court also held that while the disclaimers may be binding under the UCC, or contract law, or warranty law, they do not negate an action under the TCPA since Tenn. Code Ann. § 47-18-113 “specifically precludes disclaimer of liability under the Consumer Protection Act.” 824 S.W.2d at 539-40.

170. Defendants also missed another key Tennessee case on point. *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. Ct. App. 1992) rejected a similar argument. In *Scott Lewis Chevrolet*, the plaintiff had purchased a used truck from defendant and signed an “as-is” “no warranty” disclaimer as part of his purchase.

171. The defendant represented that the truck had never been in an accident, but the plaintiff later learned that the truck had been “wrecked.” 843 S.W.2d at 9. The jury found in favor of the plaintiff on his TCPA claim and awarded attorney fees. The defendant appealed, claiming among other things, that the “as-is” “no warranty” clause effectively disclaimed all prior representations under the TCPA. *Id.* at 9-10.

172. Relying on *Morris v. Mack's Used Cars*, 824 S.W.2d at 539 -40, the Court of Appeals rejected this argument and held that under *Mack's Used Cars*, the Tennessee Supreme

Court found that the TCPA “creates a separate and distinct cause of action for unfair or deceptive acts or practices.” This finding acknowledged:

that to hold otherwise would vitiate the ‘broad remedial intent of the Act to say that someone who has successfully disclaimed a contractual warranty has a license to engage in unfair or deceptive consumer practices.

Id. (noting Supreme Court tacitly agreed with such an observation in Judge Frank’s dissent.)

173. The Court of Appeals also considered cases from other jurisdictions that held that “as-is” or “no warranties” disclaimers did not prohibit consumer protection act claims.

843 S.W.2d at 11 (citing *Lindsay v. McMilian*, 649 S.W.2d 491 (Mo. App. 1983); *Society v. National Bank v. Pemberton*, 409 N.E.2d 1073 (Ohio Mun. 1979) and *Attaway v. Tom’s Auto Sales*, 242 S.E.2d 740 (Ga. 1978).

174. The Court of Appeals also cited *Paty v. Herb Adcox Chevrolet Co.*, 756 S.W.2d 697 (Tenn. Ct. App. 1988), noting that case held that the seller’s failure to disclose that a vehicle had been wrecked and repaired constituted a TCPA violation.

175. Courts construing the FTC Act universally hold that a statement in an advertisement which is false can never be qualified or modified. *See, e.g., H.N. Heusner & Son v. FTC*, 106 F.2d 596 (3rd Cir. 1939); *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946).

176. The Defendants are in sole control of the language they use to describe the product to the consumer. If they are selling a “consumable,” they could clearly and conspicuously disclose at the beginning of the description that the item is being sold “as is” and not use language that indicates the item is returnable, *i.e.* “Return Defective Product.”

177. Defendants choose to make their advertising confusing and inconsistent, and

not to make conspicuous disclosures regarding important information. They choose to use language that has the capacity to deceive and confuse consumers rather than to clarify their offer.

178. It is astounding that defendants even contend that a subsequent disclaimer, often hidden and concealed, cures the deception.

179. The general rule is that a “practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract.” *Robinson v. Avis Rent A Car System, Inc.*, 22 P.3d 818, 825 (Wash. App. 2001) (emphasis added).

180. Further, “the public is not under any duty to make reasonable inquiry into the truth of advertising. The Federal Trade Act is violated if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *Resort Car Rental System, Inc. v. F. T. C.*, 518 F.2d 962, 964 (9th Cir. 1975).

181. None of these defenses save the defendants from the consequences of their own deceptive conduct.

C. “Puffing” Applies to Exaggerations and Opinions, Not Facts

182. Defendants also select isolated terms or phrases out of their advertising, and claim it constitutes “puffing.” Once again, defendants misapprehend the law. “Puffing” is an exaggeration that is incredible and not taken seriously by the consumer. J. Sheldon, *Unfair and Deceptive Acts and Practices*, § 4.2.10 at p. 127 (5th ed. 2001). To prove that a claim is mere puffing, a seller must show that the exaggerated claim is harmless, purely fanciful, or a spoof, calculated to amuse with no capacity to deceive. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374

(1965).

183. Defendants cite *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 100 (Tenn. Ct. App., 1996), to support their position that certain claims made by defendants in their eBay item descriptions are mere puffing and are not actionable. Defendants again leave out key facts about a case. First, *Ladd* was a tort case involving products liability, not the TCPA.

184. Second, defendants failed to note that the *Ladd* court took a cautious stance on the puffing defense:

The courts have generally been cautious about a seller's claim that its representations were mere puffing. Thus, the question of whether a particular statement amounts to an actionable misrepresentation will generally be left to the jury whenever the circumstances indicate that the buyer reasonably understood that he or she was receiving something in the way of an assurance as to specific facts.

Id. (emphasis added).

185. The main flaw with defendants analysis is that rather than consider their advertising as a whole, defendants extract selected words and phrases which they think overrides every other aspect of their advertising, and absolves them on the grounds of "puffing."

186. The State has previously set forth the general rules regarding an appropriate advertising analysis, and merely reiterates here, that the terms defendants hold out as "puffing" cannot be read in isolation. Stated differently, "[a]n advertisement is not to be read like a refrigerator repair manual." *U.S. v. Themy*, 624 F.2d 963, 983 (10th Cir. 1980).

187. When placed in context, the terms defendants hold out as puffing, such as "Absolutely Awesome" and "Cream of the Crop" are always used in conjunction with clearly

factual terms like “New,” “Brand New,” “This item works great,” etc., as well as with heading and photographs which further reinforce an item’s condition or functionality.

188. Defendants also cite *Pizza Hut, Inc. v. Papa John's Intern., Inc.*, 227 F.3d 489 (5th Cir. 2000), a case involving a prima facie case of false advertising under the federal Lanham Act. Defendants fail to mention that Lanham Act decisions have been judicially dismissed as non-binding on Tennessee courts construing the TCPA. *See Daugherty v. Sony Electronics, Inc.*, 2006 WL 197090, *8 -10 (Tenn. Ct. App., Jan. 26, 2006). For example, in *Daugherty v. Sony Electronics, Inc.*, in the context of addressing a “puffing” defense under the TCPA, the court stated that “[d]ecisions interpreting the federal Lanham Act, of course, are not binding on this Court when interpreting the TCPA. We are explicitly required to give a liberal construction to the TCPA in order to promote the policies addressed by the statute.” 2006 WL 197090 at *8-10 (Tenn. Ct. App., Jan. 26, 2006).

189. *Daugherty* also, in effect, held that:

Where consumers assert that indeed they did rely upon Defendants’ representations and that the representations were false and misleading, in order for the court to conclude that their reliance was unreasonable, it would essentially would have to hold, as a matter of law, that notwithstanding the amount of money that Defendants spend on the descriptions and other representations they make on eBay, that they never intended for any consumer actually to rely on so much as even one of these representations and, if there was such reliance by a consumer, it was altogether unjustified.

Id. Nothing submitted by defendants indicates “puffing” took place, and once these “words” are placed in context of their advertisements as a whole, these isolated statements serve to reinforce the deceptive and false messages of defendants’ advertising.

D. Lack of Consumer Harm or Injury is Not a Defense

189. Defendants incorrectly assert that the State must prove “harm,” “injury,” or “substantial injury” as part of this proceeding. The defendants also contend that “[t]he law of consumer protection requires the State to prove that the consumer cannot reasonably avoid injury.” This is not the law, and the TCPA says nothing of the sort. Defendants fail to cite any precedent in support of this argument, other than misquoting Judge Koch’s unfairness analysis in *Tucker v. Sierra Builders*.

190. Once again, defendants’ misapprehension of the law stems directly from their confusion of private civil case law with statutory enforcement law. *Tucker v. Sierra* was a private action filed under Tenn. Code Ann. § 47-18-109, which is entitled “Private right of action - Damages - Notice to division.” Under § 47-18-109(a)(1), an individual consumer can only file a TCPA suit if that consumer has suffered an “ascertainable loss” as a result of a defendant’s conduct.

191. On the other hand, the TCPA’s law enforcement provisions, *applicable only to the State*, are set forth in Tenn. Code Ann. §§ 47-18-106, 47-18-107, 47-18-108, 47-18-114, and 47-18-116. These provisions are not available to private litigants, and contemplate a civil enforcement scheme similar to the one enforced by the Federal Trade Commission.

192. As noted in the State’s opening brief, the FTC authored the model that became the TCPA. *See Council of State Governments, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law - Revision (Vol. XXIX), Clearinghouse No. 31, 035 B. See also D. Pridgen, Consumer Protection and the Law, § 3:5 (2002).*

193. These TCPA’s special enforcement provisions are particularly helpful in

confirming that the State is *not* required to show harm in order to bring an action or to prevail thereon. As previously noted, Tenn. Code Ann. § 47-18-108(a)(1) provides:

“Whenever the division has reason to believe that any person has engaged in, is engaging in, or, based upon information received by another law enforcement agency, is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general, at the request of the division, may bring an action...”

Emphasis added. This language contemplates the filing of enforcement actions brought before any unlawful conduct occurs. Further, Tenn. Code Ann. § 47-18-108(a)(4) explicitly states that “[t]he courts are authorized to issue orders and injunctions to restrain and prevent violations of this part...” (emphasis added).

194. Again, this language implies that actions may be brought prior to any bad act occurring and therefore prior to any actual harm being done to consumers. The only harm requirement found in the TCPA is § 47-18-109, which, as previously noted, deals with private rights of action; is notably absent from any of the enforcement provisions of the TCPA.

195. A number of federal cases interpreting the FTC Act confirm this basic aspect of the law. For example, the Sixth Circuit Court of Appeals long-ago rejected the argument that the government must prove injury in an unfair and deceptive trade practices case. In *Nat’l Harness Mfrs. Ass’n. v. FTC*, 268 F. 705 (6th Cir. 1920), the Sixth Circuit held that National Harness’ argument regarding the lack of public injury was without merit.

196. The court went on to state “The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by that statute is preventive, not compensatory.” 268 F. at 712.

197. The Sixth Circuit also upheld the FTC’s ability to bring and support cases

without a showing of harm or damage in *Ford Motor Co. v. FTC*, 120 F.2d 175 (6th Cir.

1941). In *Ford*, the court stated:

Petitioner's contention that the present proceedings were not in the interest of the public must be rejected. The Federal Trade Commission Act was intended to afford a preventative remedy, not a compensatory one, so that the suggestion no damage has been shown by the offense complained of to a purchaser of petitioner's cars or a competitor is no defense to the proceeding.

Id at 182. Similarly, in *Dejay Stores, Inc. v. FTC*, 200 F.2d 865 (2nd Cir. 1952), a case involving deceptive debt collection practices, the court held that it was unnecessary to show that any person who was deceived suffered a pecuniary loss.

198. The court went on to explain that it is within the FTC's discretion to determine that a requirement that debt collectors not employ deceptive methods in collecting debts is in the public interest. 200 F.2d at 867.

199. The Attorney General of Tennessee is granted "broad discretion...in determining what matters may, or may not, be of interest to the people generally." *State ex rel Inman v. Brock*, 622 S.W. 2d 36 (Tenn. 1981).

200. Thus, the FTC has the authority to protect the public from "actual or prospective" or "injurious misapprehensions." *Bear Mill Mfg. Co. v. FTC*, 98 F.2d 67 (2nd Cir. 1938). Indeed, the FTC "exists to promote fair rules of trade and in so doing to curb practices that involve a likelihood of injury to the public, even if in a particular case the acts complained of are . . . innocent in purpose and may thus far have done little harm." 98 F.2d at 68 (*emphasis added*).

201. The "substantial injury" quotes defendants present from the *Sierra* case are taken out of context and have nothing to do with the law of deception. Defendants extracted

selected portions of Judge Koch's analysis from the separate issue of "unfairness," and incorrectly represent it as "The Law of Consumer Protection" for both deception and unfairness.

202. As set forth by the State in its opening brief, like deception, unfairness does not require proof of actual injury, but only that conduct is "likely" to cause injury. Judge Koch followed the FTC policy statement on unfairness, 15 U.S.C.A. § 45(n), and defined unfairness as an act or practice that:

causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Tucker v. Sierra Builders, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005) (*quoting* 15 U.S.C.A. § 45(n)). Judge Koch also confirmed that consumer injury will be deemed substantial "if a relatively small harm is inflicted on a large number of consumers [as here] or if a greater harm is inflicted on a relatively small number of consumers." *Id.*, *citing Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).

203. Substantial injury "must be more than trivial or speculative." *Id.*

E. The "Consumer Is In Control" is Not a Defense

204. Absent any support, defendants also claim that the consumer has complete control of the auction process. In truth, the only control the consumer has in the entire process is the decision as to whether or not make a bid, based upon the representations made to him/her by defendants, whether or not to pay and whether to post feedback about defendants.

205. And often, those decisions must be made under an element of pressure, particularly where auction bidding is active or is about to expire.

206. Thus, the only part of the auction process under the control of the consumer is the decision as to whether or not to place a bid. As stated by one court, "[t]he vice inherent in the representations is the inability of the 'gullible' price-conscious consumer to control his urge to make what he erroneously may believe is a good buy." *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963); *Helbros Watch Co. v. FTC*, 310 F.2d 868 (D.C. Cir. 1962).

207. An early Supreme Court trade case said it best:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

FTC v. Standard Education Society, 302 U.S. 112, 116 (1937).

208. And as seen in the numerous consumer complaint records, consumers based their decision to purchase from defendants based upon the express claims and representations made by the defendants, many of which were deceptive when made. Consumers are under no duty to make a reasonable inquiry into the truth of defendants' advertising. *Resort Car Rental System v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

CONCLUSION

209. The State's evidence is compelling and undisputed. The State has submitted over thirty consumer affidavits describing first-hand accounts of actual deception including misrepresentations about defendants' products, misleading return procedures, lack of customer service, and retaliation.

210. Most importantly, the State has submitted actual examples of defendants' advertising, which, in many instances is false and deceptive on its face, and thus has a tendency to mislead. In addition, this evidence is undisputed.

211. The most important evidence necessary to a resolution of the instant motion is Consumer Depot's own marketing and business information, *i.e.*, Consumer Depot's statements and conduct in the marketplace. *Consumer Depot has not disputed a single advertisement or material piece of evidence submitted by the State in its moving papers.* As the State previously demonstrated, Consumer Depot's marketing conduct, *on its face*, unequivocally demonstrates that Consumer Depot has been violating and continues to violate the Tennessee Consumer Protection Act of 1977, § 47-18-104(a) and (b) *as a matter of law*.

212. Even if Consumer Depot had properly submitted and authenticated admissible evidence, those added steps would not have mattered because Consumer Depot did nothing more than reargue legal defenses this Court previously considered and rejected *as a matter of law*. Thus, not only the State has demonstrated it is entitled to summary judgment as a matter of law, it has also effectively *negated every element in every potential defense Consumer Depot could raise at trial*. Summary judgment is therefore appropriate in favor of the State as a matter of law.

This 4 day of ~~December~~ ^{January} 2010, 2010
2009


Amanda McClendon, JUDGE

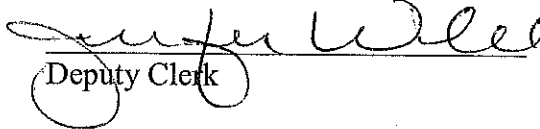
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order has been mailed U.S. Postal to the following persons:

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This 4 day of January, 2010.


Deputy Clerk